TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 265

THE UNITED STATES, APPELLANT

vs.

CORNELL STEAMBOAT COMPANY

APPEAL FROM THE COURT OF CLAIMS

FILED JANUARY 22, 1925

(30082)

SUPREME COURT OF THE UNITED STATES

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No. 265

THE UNITED STATES, APPELLANT

vs.

CORNELL STEAMBOAT COMPANY

APPEAL FROM THE COURT OF CLAIMS

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1 **In Court of Claims of the United States**

CORNELL STEAMBOAT COMPANY	
against	PETITION. 34,628
THE UNITED STATES OF AMERICA	

I. *Petition filed June 3, 1920*

To the honorable the Chief Justice and the Judges of the Court of Claims of the United States:

Your petitioner, Cornell Steamboat Company, as owner of the steam tugs Ellen M. Ronan, Ira M. Hedges, S. L. Crosby, G. W. Decker, H. D. Mould, Wilson P. Foss, E. J. Foster, Victoria, J. G. Rose, Charlie Lawrence, John T. Welch, Primrose, alleges on information and belief as follows:

First. The petitioner at all the times hereinafter mentioned was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York and the owner of the steam tugs Ellen M. Ronan, Ira M. Hedges, S. L. Crosby, G. W. Decker, H. D. Mould, Wilson P. Foss, R. J. Foster, Victoria, J. G. Rose, Charlie Lawrence, Primrose and John T. Welch.

2 Second. At various times between November 21, 1917, and January 21, 1918, the petitioner let and the United States of America hired the twelve steam tugs enumerated in article first of the petition, at certain stipulated rates. The contracts for hire were time charters for extended periods and under those time charters the Government agreed to pay at a daily rate for each and every day of the charter period. Copies of letters exchanged between the petitioner and officials in the United States Army Transport Service are hereto annexed, marked Schedules A 1, 2, 3, 4; B 1, 2; C 1, 2; D 1, 2; E 1, 2; F 1, 2; G 1, 2; H 1, 2; K 1, 2, 3, and are hereby made part of this petition.

Third. The bills for hire for the months of November, 1917, and December, 1917, were duly and properly made out and presented by your petitioner for payment in accordance with the terms of the time charters and were approved and paid in full by the proper authorities of the United States. The bills for hire for the months of January, 1918, February, 1918, March, 1918, April, 1918, May, 1918, and June, 1918, were duly and properly made out in accordance with the terms of the contract and were duly presented by your petitioner for payment. These bills, however, were not paid in full but on the contrary certain deductions were made, wrongfully and improperly by the United States in violation and breach of the aforesaid charter parties.

Fourth. Claim was duly made by petitioner to the Claims
3 Board of the Transportation Service of the War Department under public act No. 322 of the 65th Congress entitled "An act

to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," for the amount wrongfully and improperly deducted and withheld by the United States of America and said claim was disallowed under date of February, 1920.

Fifth. The bills from which the aforesaid improper and wrongful deductions were made totaled $125,438.00 and the deductions aforesaid totaled $24,822.48. Recapitulated statements of accounts and a summary are hereto annexed, marked Schedules L. 1, 2, 3, 4, 5, 6 and 7, and are hereby made a part of this petition.

Sixth. Petitioner bases its claim against the United States for damages arising out of the improper and wrongful deductions from charter hire in violation and breach of the contracts referred to in the second article of this petition and its right to sue in this court by virtue of sec. 2 of public act No. 322 of the 65th Congress entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," and further on sec. 145 of the Judicial Code of the act of March 3, 1911, Ch. 231, 36 Stat. L. 1087, which provides that the United States of America may be sued in the Court of Claims for damages in cases not sounding in tort in respect of which the claimant would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.

4 Seventh. No assignment or transfer of the claim sued on herein, or any part thereof, or interest therein, has been made. The aforesaid deductions, with interest thereon, are still unpaid and are due and owing to your petitioner from the United States.

Wherefore petitioner prays that this honorable court will find that there is now due to it the sum of $24,822.48 together with interest on $7,760.42 from January 31, 1918, on $6,533.47 from February 28, 1918, on $4,761.44 from March 31, 1918, on $4,297.15 from April 30, 1918, on $695.00 from May 31, 1918, on $775.00 from June 30, 1918, to the date of the entry of the award, and that petitioner may have such other and further relief as the court may deem just.

KIRLIN, WOOLSEY, CAMPBELL, HICKOK & KEATING,
Attorneys for Petitioner,
Office and Post Office Address, 27 William Street,
Borough of Manhattan, City of New York.

5 Jurat showing the foregoing was duly sworn to by Frederick Coykendall. Omitted in printing.

Exhibits to petition

6 SCHEDULE A 1

DEC. 1, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, City.

DEAR SIR: We confirm our telephone conversation with your office this afternoon subsequent to writing you relative to the charter of the

tugs John T. Welch and Ellen M. Ronan, and will deliver to you 7 a. m. the steel tug Ira M. Hedges; engine fore and aft compound 14″ x 28″ x 24″, steam 125 lbs. to be chartered to you in all respects same as the tug Ellen M. Ronan at one hundred and fifty ($150) dollars per day, you to furnish coal and water.

Charter to be in all respects similar to letter of even date relative to the Ellen M. Ronan.

Yours, truly,

CORNELL STEAMBOAT CO.,
BGB:B ——— ———, *Manager.*

7 SCHEDULE A 2

DEC. 1, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, City.

DEAR SIR:—This confirms our verbal arrangement to-day to charter to you tugs John T. Welch and Ellen M. Ronan upon the terms as follows:

Delivery at the Army piers, Hoboken, N. J., 7 a. m. December 3d, extent of time June 1st, 1918, extension of time after this date will be determined shortly before the expiration of the present charter, and will depend upon whether these tugs will be then available.

The price of the "John T. Welch" to be eighty ($80) dollars per twelve (12) hour day for each and every day of the charter period.

The price of the "Ellen M. Ronan" to be one hundred and fifty ($150) dollars per day of twenty-four (24) hours for each and every day of the charter period.

We are to furnish everything for these tugs with the exception of coal and water, which you are to furnish. It is agreed that these tugs now use anthracite pea coal which will be furnished by us and charged to you at cost price aboard tugs until such time as the tugs are equipped to burn soft coal. The mechanical cost of the equipment for soft coal will be paid for by us.

8 It is agreed that this letter will constitute the charter party until the formal one shall be entered into.

Yours truly,

CORNELL STEAMBOAT CO.
BGB:B ——— ———, *Manager.*

SCHEDULE A 3

561.1 DECEMBER 7, 1917.

GENERAL SUPERINTENDENT, U. S. A. T. S.
Cornell Steamboat Company,
Pier Foot W. 51st Street, New York City.

Tug boats.

1. Receipt is acknowledged of your favor of December 1st, regarding the tug boats "John T. Welch," "Ellen M. Ronan," and "Ira

M. Hedges," and in reply you are advised that the offers contained therein are accepted.

(Signed) A. C. DALTON,
Colonel, Q. M. Corps.

NJS/HKH

9 SCHEDULE A 4

561.1 OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
N. Y., December 7, 1917.

From: General Superintendent, U. S. A. T. S.
To: Cornell Steamboat Company, Pier Ft. W. 51st Street, New York City.
Subject: Tug boats.

1. Receipt is acknowledged of your favor of December 1st, regarding tug boats "John T. Welch," "Ellen M. Ronan," and "Ira M. Hedges," and in reply you are advised that the offers contained therein are accepted.

(Signed) A. C. DALTON,
Colonel, Q. M. Corps.
A. W. YAHT,
Colonel, Q. M. Corps.
NJS.

10 SCHEDULE B 1

DECEMBER 31, 1917.

Capt. N. J. SHELTON,
U. S. Army Transport Service,
104 Broad Street, New York City.

DEAR SIR: Acting upon instructions of marine superintendent, Captain W. J. Bernard, Hoboken Army Piers, we are delivering to him January 1st, the tug "S. L. Crosby," for one day's charter, double crew, at $150, per day of twenty-four hours, we to furnish everything, with the exception of coal and water, which you will furnish. If we furnish this coal and water, we will charge it to you at the cost aboard tug.

Yours truly,

CORNELL STEAMBOAT COMPANY.

BGB:L

11 SCHEDULE B 2

545.01 OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, January 1, 1918.

From: General Superintendent, U. S. A. T. S., New York City.
To: Cornell Steamboat Co., Pier Foot West 51st St., New York City.
Subject: Tug "S. L. Crosby."

Your proposal to deliver the tug "S. L. Crosby," with double crew, etc., as contained in your letter of December 31, 1917, is accepted.

By authority of general superintendent:

N. J. SHELTON,
Captain, A. Q. M.

T–NY
NJS–dp.

12 SCHEDULE C1

JAN. 26, 1918.

G. H. DALZEL, Esq.,
% Army Transport Service, Hoboken, N. J.

DEAR SIR: In accordance with the instructions of marine superintendent, Capt. W. J. Bernard, we delivered to you to-day, January 26th, the tug "Charlie Lawrence" to work as long as you may need her, at the rate of $75, per day, we to furnish everything in connection with her operation except with the exception of coal and water. If we furnish this coal and water we will charge it to you, at cost aboard the tug.

In addition, upon instructions of Capt. Bernard, we will deliver to you to-morrow, January 27th, the tug "G. W. Decker," to work double crewed for such time as you may need her at the rate of $150 per day, you to furnish coal and water, and if we furnish the coal and water, it will be charged to you at the cost aboard the tug. Please understand that the "Charlie Lawrence" operates with a single crew.

Very truly yours,

CORNELL STEAMBOAT COMPANY,
——— ———, *Manager.*

BGB: L

13 SCHEDULE C 2

WAR DEPARTMENT,
545.01 OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, Jan. 27, 1918.

From: General Superintendent, U. S. A. T. S., New York City.
To: Cornell Steamboat Co., Pier foot West 51st St., New York City.
Subject: Tug "Geo. W. Decker."

Your proposal to deliver the tug "George W. Decker" with double crew, etc., as contained in your letter of January 26th, is accepted.

By authority of general superintendent:

N. J. SHELTON,
Captain, A. Q. M.

T-NY
NJS-dp

14 SCHEDULE D 1

[Copy]

DEC. 19, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, City.

DEAR SIR: Your Captain Cogswell telephoned us to-day for an additional tug to report at the Army piers, Hoboken, for 2 or 3 days. This tug we understand to be only for temporary charter or use, so we have given you the tug *H. D. Mould* and the price will One Hundred ($100) Dollars per day of twelve (12) hours; we to furnish everything in connection with her operation.

Trusting this is satisfactory, we are
Yours truly,

CORNELL STEAMBOAT COMPANY,
——— ———, *Manager.*

BGB:B

15 SCHEDULE D 2

WAR DEPARTMENT,
OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, December 21, 1917.

From: General Superintendent Army Transport Service, 104 Broad Street, New York City.
To: Cornell Steamboat Company, Pier Ft. W. 51st Street.
Subject: Tug boat "H. D. Mould."

1. In reply to your favor of the 18th inst., regarding the use of the tug boat "H. D. Mould" at Army piers hire for two or three days, $100.00 per day, you are advised that your offer is accepted.

By authority of the general superintendent. A. T. S.

(Signed) N. J. SHELTON,
Captain, A. Q. M.

NJS/jlc

16 SCHEDULE E 1

DEC. 12, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, N. Y. City.

DEAR SIR: In accordance with our telephone conversation with you, we will charter to you the tug "Wilson P. Foss" for use at the Hoboken Army Piers, for eighty ($80) dollars per day, we to furnish everything in connection with her maintenance and operation, with the exception of coal and water, which you are to furnish. The "Foss" is to operate with a single crew. The "Foss" will be delivered to the Hoboken Piers 7 a. m., Friday, December 14th. The time of charter will be indeterminate, but we will endeavor to keep her there during the winter months and as long into the spring as we can spare her. When we find that we will have to have her back we will take the matter up with you and arrange the matter satisfactory to you.

It is understood that at the present time the tug "Foss" burns anthracite pea coal and will charge you for such coal as she uses. We wil charge you the cost of the coal aboard her until such time as we are able to arrange her grate bars for using soft coal that you furnish.

The "Foss" has a single high-pressure engine 16″ x 20″, with one boiler allowed 155 pounds of steam. Her gross tons is 58,
17 length of keel 64′2″, beam 18′ and draft about 11′ aft. This boat is nearly similar in all respect to the tug John T. Welch now under charter to you at the same price.

Yours truly,

CORNELL STEAMBOAT COMPANY,
——— ———, *Manager.*

BGB:B

SCHEDULE E 2

(Copy)

WAR DEPARTMENT,
New York, December 13th, 1917.

545.01
From: General superintendent U. S. A. T. S.
To: Cornell Steamboat Company, pier foot W. 51st St., New York City.
Subject: Tug boat "Wilson P. Foss."

1. Your favor of December 12th, 1917, regarding price for charter of the tug boat "Wilson P. Foss" is accepted under conditions named therein.

(Signed) ——— ———,
Colonel, Q. M. Corps.

MJS-bkh NJS

18 SCHEDULE F 1

JAN. 11, 1918.

Capt. JOHN F. COGSWELL,
U. S. Army Transport Service,
104 Broad Street, New York City.

DEAR CAPT. COGSWELL: Acting upon the request of Capt. W. J. Bernard, marine supt., at Hoboken, we will have a double crew on the tug "R. J. Foster" tonight, so that her rate from this time on until such time as she is singled down again and in your service will be $150 per day, you to furnish the fuel, the same as the other doubled crew tugs.

In addition, we will deliver to him to-morrow upon his request the tug "W. H. Baldwin," single crew to work at $75 per day, you to furnish the fuel.

Yours truly,

CORNELL STEAMBOAT COMPANY,
——— ———, *Manager.*

BGB:L

19 SCHEDULE F 2

WAR DEPARTMENT,
OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, January 25, 1918.

From: General Superintendent, A. T. S., Hoboken, N. J.
To: Cornell Steamboat Company, Pier Ft. West 51st St., City.
Subject: Tug "R. J. Foster."

1. Your proposal of January 11th to charter the above tug at a rate of $150.00 per twenty-four hour day, from January 12th, 1918, to a date to be advised, is hereby accepted.

By authority of the general superintendent.

(Signed) W. B. BAKER,
Director of Marine Operations.

GHD/mb

20 SCHEDULE G 1

DECEMBER 5, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, City.

DEAR SIR: In accordance with our telephone conversation to-day, we will deliver to you at the Army Piers at Hoboken, N. J., 7 a. m., Friday, December 7th, the tug Victoria for charter. The tug Victoria has a fore and aft compound engine 15″ x 30″ x 22″, steam 125 pounds. Time of charter to be from date of delivery until June 1st, 1918, if it is possible for us to leave her go from our service for that length of time, and at the present time we think this is possible. If we have to take her away we think we can supply something equally as good.

The price is to be one hundred and fifty ($150) dollars per day of twenty-four (24) hours for each and every day of the charter period; we to supply everything in connection with her maintenance and operation with the exception of coal and water which you are to furnish.

It is agreed that at the present time the Victoria burns anthracite pea coal and that we will furnish this coal to her and charge you at the cost price to us abroad the tug, until such time as we may be able to change her grate bars for the use of soft coal. We will pay the mechanical expense of changing the grate bars.

21 It is understood that this boat is provided with a double crew.

Yours truly,

CORNELL STEAMBOAT COMPANY,
———— ————, *Manager.*

BGB:B

SCHEDULE G 2

WAR DEPARTMENT,
OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, December 8th, 1917.

561.15

From: General Superintendent, Army Transport Service, New York.

To: Cornell Steamboat Company, Pier Ft. West 51st St., New York.

Subject: Tug "Victoria."

1. Acknowledgment is made of your letter of December 5th.

2. You are advised that the Army Transport Service accepts your proposal of charter of the above tug at a charter rate of $150.00 per 24-hour day, from 7.00 a. m. December 7, 1917, to a date to be advised.

3. It is understood that you will supply double crew and everything in connection with her maintenance and operation with the exception of coal and water, which is to be furnished by this service.

22 It is further agreed that until such time as the grate bars are changed to permit the use of soft coal, the tug will burn anthracite pea coal, to be furnished by you at cost.

By authority of the General Superintendent.

(Signed) N. J. SHELTON,
Captain, A. Q. M.,
Officer in charge Transportation Div.

MJP/jlc

SCHEDULE H 1

DECEMBER 31, 1917.

Capt. JOHN F. COGSWELL,
Army Transport Service,
104 Broad Street, New York City.

DEAR SIR: In accordance with our telephone conversation of this morning, we are delivering the tug "J. G. Rose," to Captain Bernard, Pier 1, Hoboken Army Piers, for charter.

The tug "J. G. Rose" was built of steel in 1900.

Keel, 68'.
Beam, 19'.
Depth of hold, 8'.
Engine fore and aft, surface condensing compound, 13" x 29" x 18" stroke.
Power pressure, 155 lbs.

23 It is agreed that we are to furnish her with a double crew for twenty-four (24) hours service and to find everything in connection with her operation, with the exception of coal and water which you are to furnish. The price is one hundred and fifty ($150) dollars, per day of twenty-four hours, for each and every day of the charter.

Date of delivery, December 31, 1917.
Date of expiration of charter, Apr. 1, 1918.

At the time of the expiration, we will determine whether or not it is possible for us to leave her further in your service, or endeavor to replace her with some tug that will do the work as well.

It is agreed that the tug "J. G. Rose," at present burns anthracite pea coal, and that pending the time we are arranging to and installing grate bars which will permit the burning of soft coal, we are to furnish the necessary pea coal, or its equivalent, and charge you for such coal, which she may use during this period, at the cost to us aboard the tug.

It is agreed that the tug "J. G. Rose" shall be allowed one (1) day in each thirty (30) to wash boiler, and that this wash boiler day shall be paid for at the foregoing rate of hire.

It is agreed that we are both familiar with the Government and Army regulations relative to the hours of service for the tug and crew, and that both tug and crew shall be allowed the necessary time off, as has been provided, but, however it is agreed that the
24 tug and crew are subject to the orders of the Army Transport Service for all work they may be required to do.

Yours truly,

CORNELL STEAMBOAT CO.
——— ———, *Manager.*

BGB:L

SCHEDULE H 2

WAR DEPARTMENT,
OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE.
New York, January 21st, 1918.

From: General Superintendent, A. T. S., 104 Broad Street, New York City.

To: Cornell Steamboat Co., Pier Foot West 51st St., New York City.

Subject: Tug "J. G. Rose."

1. Your proposal of December 31st, 1917, to charter the above tug to the Army Transport Service from date of delivery, December 31st, 1917, to March 31, 1918, at a rate of $150.00 per twenty-four hour day, coal and water to be furnished by this service, is hereby accepted.

By authority of the General Sup., A. T. S.

(Signed) G. W. K.,
Captain, Q. M. R. C.

GHD/wcr
T-NY

25 SCHEDULE K 1

Nov. 21, 1917.

Captain N. J. SHELTON,
Army Transport Service,
No. 104 Broad Street, New York City.

DEAR SIR:—We confirm our verbal arrangements of to-day to charter to you the tug "Primrose," engine 16″ x 20″, steam 155 pounds and the tug "Charlie Lawrence," engine 18″ x 18″, steam 140 pounds, with a single crew and everything found, excepting coal and water, which you are to furnish, at the rate of seventy-five ($75.00) dollars, for each and every day, per tug, beginning seven a. m. November 22nd, 1917.

It is understood that these two tugs are placed in service on trial for several days and if they meet with your requirements formal

charter party is to be executed for the hire of these tugs by you continually until June 1st, 1918, at the same rate, with a privilege of renewal after that date.

Yours truly,

CORNELL STEAMBOAT CO.
————————, *Manager.*

BGB:B

26 SCHEDULE K 2

(Copy)

Nov. 22, 1917.

Captain N. J. SHELTON,
Army Transport Service,
No. 104 Broad Street, New York City.

DEAR SIR:—The tugs "Charlie Lawrence" and "Primrose" normally burn anthracite pea coal and not bituminous coal, which you furnish. Their present grates are arranged for hard coal. Inasmuch as these two boats are in your service to-day, as per our letter of November 21st, on a trial basis, we suggest that we furnish the coal during this trial and charge it to you at cost to us, aboard the tug. Then if these tugs prove satisfactory and you wish to make a charter for a period of time we will change the grates for soft coal.

Please advise if this is satisfactory to you.

Yours truly,

CORNELL STEAMBOAT COMPANY,
————————, *Manager.*

BGB:B

27 SCHEDULE K 3

(Copy)

WAR DEPARTMENT,
N. Y., November 24, 1917.

General Superintendent, U. S. A. T. S.

To: Cornell Steamboat Company, New York City.
Sub: Tug boats "Primrose" and "Charlie Lawrence."

1. Your favor of November 21st, offering the tug boats "Primrose" and "Charlie Lawrence" for charter to the Army Transport Service has been received and accepted according to the conditions stated in your letter.

2. In this connection and in reference to your letter of November 22nd, you are advised that it is agreeable to this office that you delay changing the grate bars in two (2) tugs mentioned, and that you supply coal at cost price to the Government while these boats are undergoing trial.

By authority of the General Superintendent, U. S. A. T. S.

(Signed) N. J. SHELTON,
Captain, A. Q. M.

NJS–bkh

28

SCHEDULE L 1

Statement of accounts of Cornell Steamboat Company for hire of tugs to Army Transport Service, New York

	Total of bill	Amount paid	Balance due
January, 1918	$38,995.00	$31,234.58	$7,760.42
February, 1918	31,512.00	24,978.53	6,533.47
March, 1918	32,459.00	27,697.56	4,761.44
April, 1918	10,837.50	6,540.35	4,297.15
May, 1918	5,858.00	5,163.00	695.00
June, 1918	5,776.50	5,001.50	775.00
	125,438.00	100,615.52	24,822.48

29

SCHEDULE L 2

Statement of accounts of Cornell Steamboat Company for hire of tugs to Army Transport Service, New York, January, 1918

Tug	Total	Amount paid	Amount due
Ellen M. Ronan	$5,863.50	$4,663.50	$1,200.00
Ira M. Hedges	5,112.50	1,662.50	3,450.00
S. L. Crosby	216.50	141.50	75.00
G. W. Decker	799.50	724.50	75.00
H. D. Mould	2,484.00	1,892.33	591.67
Wilson P. Foss	3,103.50	2,699.25	406.25
R. J. Foster	3,438.50	3,138.50	300.00
Victoria	5,735.50	5,185.50	550.00
J. G. Rose	5,350.50	4,563.00	787.50
Charlie Lawrence	1,502.00	1,352.00	150.00
Primrose	5,389.00	5,214.00	175.00
	38,995.00	31,234.58	7,760.42

30

SCHEDULE L 3

Statement of accounts of Cornell Steamboat Company for hire of tugs to Army Transport Service, New York, during February, 1918

Tug	Total	Paid by Government	Due
Foss, W. P	$2,678.50	$2,438.50	$240.00
Foster, R. J	2,571.00	2,271.00	300.00
Hedges, Ira M	4,200.00	600.00	3,600.00
Mould, H. D	2,800.00	2,100.28	699.72
Primrose	4,988.50	4,032.25	956.25
Ronan, E. M	4,466.50	4,104.00	362 50
Rose, J. G	4,725.00	4,650.00	75.00
Victoria	5,082.50	4,782.50	300.00
	31,512.00	24,978.53	6,533.47

31

SCHEDULE L 4

Statement of accounts of Cornell Steamboat Company for hire of tugs to Army Transport Service, New York, during March, 1918

Tug	Total	Paid by Govt.	Due
Foss, W. P	$3,019.50	$2,436.17	$583.33
Foster, R. J	2,908.00	2,583.00	325.00
Hedges, Ira M	4,686.00	4,123.50	562.50
Primrose	5,767.50	4,986.25	781.25
Ronan, E. M	4,689.00	4,035.88	653.12
Rose, J. G	5,717.00	4,907.63	809.37
Victoria	5,672.00	4,625.13	1,046.87
	32,459.00	27,697.56	4,761.44

32

SCHEDULE L 5

Statement of accounts of Cornell Steamboat Company for hire of tugs to Army Transport Service, New York, during April, 1918

Tug	Total	Paid by Govt.	Due
Foss, W. P	$2,932.50	$2,166.60	$765.90
Foster, R. J	2,805.00	1,980.00	825.00
Hedges, I. M	1,666.50	541.50	1,125.00
Ronan, E. M	1,666.50	1,579.00	87.50
Primrose	1,767.00	273.25	1,493.75
	10,837.50	6,540.35	4,297.15

SCHEDULE L 6

Statement of accounts of Cornell Steamboat Company for hire of tugs to Army Transport Service, New York, during May, 1918

Tug	Total	Paid by Govt.	Due
Foss, W. P	$2,999.00	$2,679.00	$320.00
Foster, R. J	2,859.00	2,484.00	375.00
	5,858.00	5,163.00	695.00

33

SCHEDULE L 7

Statement of accounts of Cornell Steamboat Company for hire of tugs to Army Transport Service, New York, during June, 1918

Tug	Total	Paid by Govt.	Due
Foss, W. P	$2,902.50	$2,502.50	$400.00
Foster, R. J	2,874.00	2,499.00	375.00
	5,776.50	5,001.50	775.00

Foster includes July 1st, when charter expired.

34 II. *General traverse. Entered Aug. 9, 1920*

No demurrer, plea, answer, counterclaim, setoff, claim of damages, demand, or defense in the premises having been entered on the part of the defendant a general traverse is entered as provided by Rule 34.

III. *History of proceedings*

On December 12, 1922, this case was argued and submitted on merits by Mr. Robert S. Erskine, for plaintiff, and by Mr. William L. Cole, for defendant.

On June 4, 1923, the court filed an order remanding the case to the calendar, and allowed both parties to take testimony.

IV. *Argument and submission of case*

On October 8, 1923, this case was argued and submitted by Mr. Robert S. Erskine, for the plaintiff, and submitted without argument by Mr. William S. Cole, for defendant.

35 IV. *Finding of fact, conclusion of law, opinion of the court, by Hay, J., and appendix to court's findings, entered Oct. 29, 1923*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact

I

The plaintiff, the Cornell Steamboat Co., is a corporation organized under the laws of the State of New York and at the times hereinafter mentioned was the owner of the tugs, "Ellen M. Ronan," "Ira M. Hodges," "S. L. Crosby," "G. W. Decker," "H. D. Mould," "Wilson P. Foss," "R. J. Foster," "Victoria," "John G. Rose," "Charlie Lawrence," "Primrose," and "John T. Welch."

II

Captain N. J. Shelton on November 8, 1917, was the officer in charge of the transportation division with the general superintendent of the Army Transport Service and as such officer was authorized to contract for the hire of tugs for the use of the United States in New York Harbor. Bruce G. Broad was the general manager of the plaintiff company and as such was authorized to make contracts for the use of tugs belonging to the plaintiff company. On November

21, 1917, and on November 22, 1917, the plaintiff company wrote the following letters to Captain N. J. Shelton:

NOVEMBER 21, 1917.

Captain N. J. SHELTON,
Army Transport Service,
No. 104 Broad Street, New York City.

DEAR SIR: We confirm our verbal arrangements of to-day to charter to you the tug "Primrose," engine 16″ x 20″, steam 155 pounds and the tug "Charlie Lawrence," engine 18″ x 18″, steam 140 pounds, with a single crew and everything found, excepting coal and water, which you are to furnish, at the rate of seventy-five ($75.00)
36 dollars, for each and every day, per tug, beginning seven a. m. November 22nd, 1917.

It is understood that these two tugs are placed in service on trial for several days and if they meet with your requirements formal charter party is to be executed for the hire of these tugs by you continually until June 1st, 1918, at the same rate, with a privilege of renewal after that date.

Yours truly,

CORNELL STEAMBOAT CO.,
——— ———, *Manager.*

BGB:B.

NOVEMBER 22, 1917.

Captain N. J. SHELTON,
Army Transport Service,
No. 104 Broad Street, New York City.

DEAR SIR: The tugs "Charlie Lawrence" and "Primrose" normally burn anthracite pea coal and not bituminous coal, which you furnish. Their present grates are arranged for hard coal. Inasmuch as these two boats are in your service to-day, as per our letter of November 21st, on a trial basis, we suggest that we furnish the coal during this trial and charge it to you at cost to us, aboard the tug. Then if these tugs prove satisfactory and you wish to make a charter for a period of time we will change the grates for soft coal.

Please advise if this is satisfactory to you.

Yours truly,

CORNELL STEAMBOAT CO.,
——— ———, *Manager.*

BGB: B.

To these letters Captain Shelton replied as follows:

NEW YORK, *November 24, 1917.*

General Superintendent, U. S. A. T. S.
To: Cornell Steamboat Company, New York City.
Sub: Tug boats "Primrose" and "Charlie Lawrence."

1. Your favor of November 21st, offering the tug boats "Primrose" and "Charlie Lawrence" for charter to the Army Transport Service,

has been received and accepted according to the conditions stated in your letter.

2. In this connection and in reference to your letter of November 22nd, you are advised that it is agreeable to this office that you delay changing the grate bars in two (2) tugs mentioned, and that you supply coal at cost price to the Government while these boats are undergoing trial.

By authority of the General Superintendent, U. S. A. T. S.

(Signed) N. J. SHELTON,
Captain, A. Q. M.

NJS–bkh.

The tug "Primrose" was in the service of the Government continuously from January 1, 1918, to April 11, 1918, a period
37 of 101 days. Six days of this time the "Primrose" was a 12-hour day tug at $75 per day, and the residue of the time was a 24-hour day tug at $150 per day.

The tug "Charlie Lawrence" was in the service of the United States 13 days in January, 1918.

On December 1, 1917, the plaintiff company wrote the following letter to Captain N. J. Shelton:

DECEMBER 1, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, City.

DEAR SIR: This confirms our verbal arrangement to-day to charter to you the tugs "John T. Welch" and "Ellen M. Ronan" upon the terms as follows:

Delivery at the Army Piers, Hoboken, N. J., 7 a. m. December 3d, extent of time June 1st, 1918; extension of time after this date will be determined shortly before the expiration of the present charter, and will depend upon whether these tugs will be then available.

The price of the "John T. Welch" to be eighty ($80) dollars per twelve (12) hour day for each and every day of the charter period.

The price of the "Ellen M. Ronan" to be one hundred and fifty ($150) dollars per day of twenty-four (24) hours for each and every day of the charter period.

We are to furnish everything for these tugs with the exception of coal and water, which you are to furnish. It is agreed that these tugs now use anthracite pea coal, which will be furnished by us and charged to you at cost price aboard tugs until such time as these tugs are equipped to burn soft coal. The mechanical cost of the equipment for soft coal will be paid for by us.

It is agreed that this letter will constitute the charter party until the formal one shall be entered into.

Yours truly,

CORNELL STEAMBOAT CO.
———— ————, *Manager.*

BGB:B

To this letter the following replies were sent:

DECEMBER 7, 1917.

561.1
General Superintendent, U. S. A. T. S.
Cornell Steamboat Company, Pier Foot W. 51st Street, New York City.
Tugboats.

1. Receipt is acknowledged of your favor of December 1st, regarding the tugboats "John T. Welch," "Ellen M. Ronan," and "Ira M. Hedges," and in reply you advised that the offers contained therein are accepted.

(Signed) A. C. DALTON.
Colonel, Q. M. Corps.

NJS/HKH
38

OFFICE OF THE GENERAL SUPERINTENDENT
U. S. ARMY TRANSPORT SERVICE,
New York, December 7, 1917.

561.1
From: General Superintendent, U. S. A. T. S.
To: Cornell Steamboat Company, Pier Ft. W. 51st Street, New York City.
Subject: Tugboats.

1. Receipt is acknowledged of your favor of December 1st, regarding tugboats "John T. Welch," "Ellen M. Ronan," and "Ira M. Hedges," and in reply you are advised that the offers contained therein are accepted.

(Signed) A. C. DALTON,
Colonel, Q. M. Corps.
A. W. YAHT,
Colonel, Q. M. Corps.

NJS

The tug "Ellen M. Ronan" was in the service of the Government continuously from January 1, 1918, to April 11, 1918, a period of 101 days.

The tug "Ira M. Hedges" was in the service of the Government continuously from January 1, 1918, to April 11, 1918, a period of 101 days, and was during this time a 24-hour day tug at $150 per day.

In accordance with the contract, these tugs were delivered at the Army piers, Hoboken, N. J., seven a. m., December 3d.

On December 5, 1917, the plaintiff company wrote the following letter to Captain N. J. Shelton:

DECEMBER 5, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, City.

DEAR SIR: In accordance with our telephone conversation to-day, we will deliver to you at the Army piers at Hoboken, N. J., 7 a. m.,

Friday, December 7th, the tug "Victoria" for charter. The tug "Victoria" has a fore and aft compound engine 15" x 30" x 22", steam 125 pounds. Time of charter to be from date of delivery until June 1st, 1918, if it is possible for us to leave her go from our service for that length of time, and at the present time we think this is possible. If we have to take her away we think we can supply something equally as good.

The price is to be one hundred and fifty ($150) dollars per day of twenty-four (24) hours for each and every day of the charter period; we to supply everything in connection with her maintenance and operation with the exception of coal and water, which you are to furnish.

It is agreed that at the present time the "Victoria" burns anthracite pea coal and that we will furnish this coal to her and charge you at the cost price to us aboard the tug, until such time as we
39 may be able to change her grate bars for the use of soft coal. We will pay the mechanical expense of changing the grate bars.

It is understood that this boat is provided with a double crew.

Yours truly,

CORNELL STEAMBOAT COMPANY.
———— ————, *Manager.*

BGB:B

To this letter Captain Shelton replies as follows:

OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE.
New York, December 8, 1917.

561.15

From: General Superintendent, Army Transport Service, New York.

To: Cornell Steamboat Company, Pier Ft. West 51st St., New York.

Subject: Tug "Victoria."

1. Acknowledgement is made of your letter of December 5th.

2. You are advised that the Army Transport Service accepts your proposal of charter of the above tug at a charter rate of $150.00 per 24-hour day, from 7.00 a. m. December 7, 1917, to a date to be advised.

3. It is understood that you will supply double crew and everything in connection with her maintenance and operation with the exception of coal and water, which is to be furnished by this service.

It is further agreed that until such time as the grate bars are changed to permit the use of soft coal, the tug will burn anthracite pea coal, to be furnished by you at cost.

By authority of the general superintendent.

(Signed) N. J. SHELTON,
Captain, A. Q. M.,
Officer in charge Transportation Div.

MJP/jlc

The tug "Victoria" was in the service of the Government continuously from January 1 to March 31, 1918, inclusive.

On December 19, 1917, the plaintiff wrote the following letter to Captain N. J. Shelton:

DECEMBER 19, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, City.

DEAR SIR: Your Captain Cogswell telephoned us to-day for an additional tug to report at the Army Piers, Hoboken, for 2 or 3 days. This tug we understand to be only for temporary charter or use, so we have given you the tug "H. D. Mould" and the price will be one hundred ($100) dollars per day of twelve (12) hours; we to furnish everything in connection with her operation.

Trusting this is satisfactory, we are,

Yours truly,

CORNELL STEAMBOAT COMPANY,
——— ———, *Manager.*

BGB:B

To this letter Captain Shelton replies as follows:

OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, December 21, 1917.

From: General Superintendent, Army Transport Service, 104 Broad Street, New York City.
To: Cornell Steamboat Company, Pier Ft. W. 51st Street.
Subject: Tug boat "H. D. Mould."

1. In reply to your favor of the 18th inst., regarding the use of the tug boat "H. D. Mould" at Army Piers hire for two or three days, $100.00 per day, you are advised that your offer is accepted.

By authority of the general superintendent, A. T. S.

(Signed) N. J. SHELTON,
Captain, A. Q. M.

NJS/jlc

The tug "H. D. Mould" was in the service of the Government 23 days in January and 28 days in February, 1918.

On December 12, 1917, the plaintiff company wrote the following letter to Captain N. J. Shelton:

DECEMBER 12, 1917.

Captain N. J. SHELTON,
U. S. Army Transport Service,
No. 104 Broad Street, N. Y. City.

DEAR SIR: In accordance with our telephone conversation with you, we will charter to you the tug "Wilson P. Foss," for use at the Hoboken Army Piers, for eighty (80) dollars per day; we to furnish everything in connection with her maintenance and operation, with the exception of coal and water, which you are to furnish. The "Foss" is to operate with a single crew. The "Foss" will be de-

livered to the Hoboken Piers 7 a. m., Friday, December 14th. The time of charter will be indeterminate, but we will endeavor to keep her there during the winter months, and as long into the spring as we can spare her. When we find that we will have to have her back we will take the matter up with you and arrange the matter satisfactory to you.

It is understood that at the present time the tug "Foss" burns anthracite pea coal and will charge you for such coal as she uses. We will charge you the cost of the coal aboard her until such time as we are able to arrange her grate bars for using soft coal that you furnish.

The "Foss" has a single high-pressure engine 16″ x 20″, with one boiler allowed 155 pounds of steam. Her gross tons is 58, length of keel 64′2″, beam 18′ and draft about 11′ aft. This boat is nearly similar in all respects to the tug "John T. Welch" now under charter to you at the same price.

Yours truly,

CORNELL STEAMBOAT COMPANY.
———— ————, *Manager.*

BGB:B

41 To this letter the following reply was sent:

NEW YORK, *December 13, 1917.*

545.01
From: General Superintendent, U. S. A. T. S.
To: Cornell Steamboat Company, Pier foot W. 51st St., New York City.
Subject: Tugboat "Wilson P. Foss."

1. Your favor of December 12th, 1917, regarding price for charter of the tugboat "Wilson P. Foss" is accepted under conditions named therein.

(Signed) ————— ————,
Colonel, Q. M. Corps.
NJS

MJS-bkh

The tug "Wilson P. Foss" was in the service of the Government 180 days from January 2d to July 1, 1918.

On December 31, 1917, the plaintiff company wrote the following letter to Captain John F. Cogswell:

DECEMBER 31, 1917.

Capt. JOHN F. COGSWELL,
Army Transport Service,
104 Broad Street, New York City.

DEAR SIR: In accordance with our telephone conversation of this morning, we are delivering the tug "J. G. Rose" to Captain Bernard, Pier 1, Hoboken Army Piers, for charter.

The tug "J. G. Rose" was built of steel in 1900.
Keel, 68′.
Beam, 19′.
Depth of hold, 8′.

Engine fore and aft, surface condensing compound, 13″ x 29″ x 18″ stroke.

Power pressure, 155 lbs.

It is agreed that we are to furnish her with a double crew for twenty-four (24) hours' service and to find everything in connection with her operation, with the exception of coal and water which you are to furnish. The price is one hundred and fifty ($150) dollars, per day of twenty-four hours, for each and every day of the charter.

Date of delivery, December 31, 1917.

Date of expiration of charter, Apr. 1, 1918.

At the time of the expiration we will determine whether or not it is possible for us to leave her further in your service, or endeavor to replace her with some tug that will do the work as well.

It is agreed that the tug "J. G. Rose" at present burns anthracite pea coal, and that pending the time we are arranging to and installing grate bars, which will permit the burning of soft coal, we are to furnish the necessary pea coal or its equivalent, and charge you for such coal, which she may use during this period, at the cost to us aboard the tug.

It is agreed that the tug "J. G. Rose" shall be allowed one (1) day in each thirty (30) to wash boiler, and that this wash-boiler day shall be paid for at the foregoing rate of hire.

42 It is agreed that we are both familiar with the Government and Army regulations relative to the hours of service for the tug and crew, and that both tug and crew shall be allowed the necessary time off, as has been provided, but, however, it is agreed that the tug and crew are subject to the orders of the Army Transport Service for all work they may be required to do.

Yours truly,

CORNELL STEAMBOAT CO.,
——— ———, *Manager.*

BGB:L

To this letter the following reply was sent:

WAR DEPARTMENT,
OFFICE OF THE GENERAL SUPERINTENDENT.
U. S. ARMY TRANSPORT SERVICE.
New York, January 21, 1918.

From: General Superintendent, A. T. S., 104 Broad Street, New York City.

To: Cornell Steamboat Co., Pier foot West 51st St., New York City, Subject: Tug "J. G. Rose."

1. Your proposal of December 31st, 1917, to charter the above tug to the Army Transport Service from date of delivery, December 31st, 1917, to March 31, 1918, at a rate of $150.00 per twenty-four hour day, coal and water to be furnished by this service, is hereby accepted.

By authority of the General Sup. A. T. S.

(Signed) G. W. K.,
Captain, Q. M. R. C.

T-NY GHD/wcr

The tug "J. G. Rose" was in the service of the Government 90 days from January 1, 1918, to March 31, 1918. She was delivered in accordance with provisions of the contract.

On December 31, 1917, the plaintiff company wrote the following letter to Captain N. J. Shelton:

DECEMBER 31, 1917.

Capt. N. J. SHELTON,
U. S. Army Transport Service,
104 Broad Street, New York City.

DEAR SIR: Acting upon instructions of Marine Superintendent, Captain W. J. Bernard, Hoboken Army Piers, we are delivering to him January 1st the tug "S. L. Crosby," for one day's charter, double crew, at $150 per day of twenty-four hours, we to furnish everything, with the exception of coal and water, which you will furnish. If we furnish this coal and water, we will charge it to you at the cost aboard tug.

Yours truly,

CORNELL STEAMBOAT COMPANY.

BGB:L

43 To this letter Captain N. J. Shelton replied as follows:

OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, January 1, 1918.

545.01
From General Superintendent, U. S. A. T. S., New York City.
To: Cornell Steamboat Co., Pier Foot West 51st St., New York City.
Subject: Tug S. L. Crosby.

Your proposal to deliver the tug "S. L. Crosby," with double crew, etc., as contained in your letter of December 31, 1917, is accepted.

By authority of General Superintendent:

N. J. SHELTON,
Captain, A. Q. M.

T–NY NJS–dp.

The tug "S. L. Crosby" was in the service of the Government for one day in January, 1918.

On January 11, 1918, the plaintiff company wrote the following letter to Captain John F. Cogswell:

JANUARY 11, 1918.

Capt. JOHN F. COGSWELL,
U. S. Army Transport Service,
104 Broad Street, New York City.

DEAR CAPT. COGSWELL: Acting upon the request of Capt. W. J. Bernard, Marine Supt., at Hoboken, we will have a double crew on the tug "R. J. Foster" tonight, so that her rate from this time on until such time as she is singled down again, and in your service, will be $150 per day, you to furnish the fuel, the same as the other doubled crew tugs.

In addition we will deliver to him to-morrow upon his request, the tug "W. H. Baldwin," single crew to work at $75 per day, you to furnish the fuel.

Yours truly,

CORNELL STEAMBOAT COMPANY,
——— ———, *Manager.*

BGB:L

To this letter the following reply was sent:

OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, January 25, 1918.

From: General Superintendent, A. T. S., Hoboken, N. J.
To: Cornell Steamboat Company, Pier Ft. West 51st St., City.
Subject: Tug R. J. Foster.

1. Your proposal of January 11th to charter the above tug at a rate of $150.00 per twenty-four hour day, from January 12th, 1918, to a date to be advised, is hereby accepted.

By authority of the General Superintendent.

(Signed) W. B. BAKER,
Director of Marine Operations.

GHD/mb

The tug "R. J. Foster" was in the service of the Government continuously for 197 days from January 6, 1918, to July 1, 1918.

44 On January 26, 1918, the plaintiff company wrote the following letter to G. H. Dalzell:

JANUARY 26, 1918.

G. H. DALZELL, Esq.,
% Army Transport Service, Hoboken, N. J.

DEAR SIR: In accordance with instructions of Marine Superintendent, Capt. W. J. Bernard, we delivered to you to-day, January 26th, the tug "Charlie Lawrence" to work as long as you may need her, at the rate of $75 per day, we to furnish everything in connection with her operation with the exception of coal and water. If we furnish this coal and water we will charge it to you, at cost aboard the tug.

In addition, upon instructions of Capt. Bernard, we will deliver to you to-morrow January 27th, the tug "G. W. Decker," to work double crewed for such time as you may need her at the rate of $150 per day, you to furnish coal and water, and if we furnish the coal and water, it will be charged to you at the cost aboard the tug. Please understand that the "Charlie Lawrence" operates with a single crew.

Very truly yours,

CORNELL STEAMBOAT COMPANY,
——— ———, *Manager.*

BGB:L

To this letter the following reply was sent:

OFFICE OF THE GENERAL SUPERINTENDENT,
U. S. ARMY TRANSPORT SERVICE,
New York, January 27, 1918.

545.01
From: General Superintendent, U. S. A. T. S., New York City.
To: Cornell Steamboat Co., Pier Foot West 51st St., New York City.
Subject: Tug "Geo. W. Decker."

Your proposal to deliver the tug "George W. Decker" with double crew, etc., as contained in your letter of January 26th, is accepted.

By authority of General Superintendent:

N. J. SHELTON,
Captain, A. Q. M.

T-NY NJS-dp

The tug "G. W. Decker" was in the service of the Government four days in January, 1918.

III

All of the tugs hereinbefore enumerated reported for service in accordance with the contract. The plaintiff company rendered its bills monthly and for a full monthly period at a rate per day stated in the contract. The defendant paid the bills as they were rendered for the month of December, 1917, and thereafter for each month refused to pay the full amount claimed and deducted therefrom the various sums shown in the table found on page 114 of the record and which is attached as an appendix to this finding, making a total deduction of $24,822.48. The deductions made were in conformity with the logs of the vessels. Said logs were kept by the captains and engineers of the boats and were directed to be kept by the
45 marine superintendent, Army Transport Service, who had charge of the boats, and these logs were made off on blanks furnished to the captains and engineers of the boats by the aforesaid marine superintendent.

It appears that these deductions were made if a boat reported with a short crew or not in condition to perform the service required and if too long a time was consumed in the opinion of the officer in charge when taking on supplies. The plaintiff received due notice of the aforesaid deductions and rendered its bills for the full service, setting out the deductions and protesting their allowance and accepting the decreased payments under express protest in each instance.

IV

The tug "Ira Hedges," while in the service of the Government and under its control, sank while towing a barge of coal from Perth Amboy, N. J., to the Erie Basin Dry Dock. The plaintiff was notified of this accident, and at its own expense raised the vessel, repaired it, and it was subsequently used by the defendant. A deduction was made for loss of time due to this accident.

V

During the time when the tugs hereinbefore mentioned were in the service of the Government, the Army Transport Service had the entire use of the tugs and they were subject at all times to the orders and directions of the officers of the Government, and at no time during the period did the plaintiff have the use of and did not in any way interfere with or direct the operations of the said tugs.

VI

The plaintiff rendered its bills for the use of these tugs for January, February, April, March, May, and June, 1918. Its bills for service amounted to the sum of $125,438; it was paid $100,615.52, leaving the balance, which has not been paid, $24,822.48.

Conclusion of law

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is entitled to recover. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-four thousand eight hundred and twenty-two dollars and forty-eight cents ($24,822.48).

Opinion

HAY, judge, delivered the opinion of the court:

This is a suit by the plaintiff to recover from the United States the sum of $24,822.48, alleged by the plaintiff to be due it on account of deductions made by the United States from the hire of certain steam tugs chartered by the Government from the plaintiff for certain periods of time from November, 1917, to June, 1918.

46 The contract is set out in letters which were written by the parties. These letters are set out in full in the findings of the court. In the letter of the plaintiff of December, 1917, the following occurs: "It is agreed that this letter will constitute the charter party until the formal one shall be entered into." On December 7, 1917, the defendant in a letter of that date accepted the proposition of the plaintiff. All the boats hired by the Government were hired upon the same terms, and it was provided in the contract that the per diem hire should be paid to the plaintiff for each and every day of the charter period. These tugs were hired by the Government for different periods of time, and the time of hire of each tug is set out in the findings of the court.

The tugs reported for service in accordance with the contract. The plaintiff rendered its bills monthly and for a full monthly period at a rate per day stated in the contract. The defendant paid the bills as they were rendered for the month of December, 1917, and thereafter refused to pay the full amount claimed and deducted

therefrom various sums, which sums make up the amount of the plaintiff's claim. The deductions were made in conformity with the logs of the vessels. These logs were kept by the captains and engineers of the boats, and were directed to be kept by the marine superintendent, Army Transport Service, who had charge of the boats, and these logs were kept on blanks furnished by the marine superintendent, an officer of the defendant.

During the time when these tugs were in the service of the Government the Army Transport Service had the entire use of the tugs and they were subject at all times to the orders and directions of the officers of the Government, and at no time during that period did the plaintiff have the use of and did not in any way interfere with or direct the operations of the said tugs.

The United States defends this suit upon the ground that the owner did not part with the possession, command, and navigation of the tugs during the period of the charter, but that it retained possession and command and performed the specific service for which the tugs were let. It is claimed that the charter was for service and not a demise, and consequently that the Government had the right to make the deductions for the time the tugs were not at its disposal.

The well-established law is that when a ship is let to hire, and the owner parts with the possession, command, and navigation of the same, the charter is to be regarded as the owner for the period of the charter, and consequently can not charge the owner of the ship with time lost during the charter period. The decision in each case depends upon the facts and circumstances surrounding the transaction, but the possession, management, and control of the vessel seem to be the vital facts upon which the decision must rest.

In Reed v. United States, 11 Wall. 591, 601, the court said: "* * * but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and, if need be, he may appoint the master and ship the mariners, and he becomes responsible for their acts."

In Leary v. United States, 14 Wall. 607, 610, the court said: "The question as to the character in which the charterer is to be
47 treated is in all cases one of construction. If the charter party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage of service stipulated." And in the same case, page 611: "All the cases agree that entire command, possession of the vessel, and consequent control over its navigation must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned."

In the case of United States v. Shea, 152 U. S. 178, Mr. Justice Brewer, in speaking for the court, delivered a learned opinion in which he discussed very fully the question, and at some length reviews the cases bearing on the question in issue here.

On page 189 he says: "No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control." As particularly bearing on the facts which the court has found in this case, Mr. Justice Brewer says, p. 190: "That the time for which the vessels were to be employed might be limited by the wishes of the Government does not affect the question as to whether, while so employed, they were to be under its exclusive control and management. A demise may be for a day as well as for a year and may be terminable at the will of the lessor." And again: "We thing little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control. If it be said that the clause requiring the Government to furnish fuel was unnecessary in case there was a demise, it may also, in like manner, be said that the further clause as to the petitioner's furnishing a crew was unnecessary if he was to retain the management and control. Any possible inference from one clause may be set off against a different inference from the other, but neither of them destroys the significance of the operative words of transfer nor outweighs that of the action of the parties in the execution of the contract."

In the case of Plant Investment Co. v. United States, 45 C. Cls., 374, 385, Judge Booth, speaking for the court, says: "The decision in each case depends upon the peculiar facts and circumstances surrounding the transaction, and in consequence thereof it is difficult to determine with great accuracy into which class a charter party falls. In the class of cases relating to the charter of merchant vessels, wherein the parties are engaged in water transportation for profit, it seems reasonably certain that the courts have not hesitated to construe the charter party a demise of the vessel. It would not be accurate to say that in some instances vessels chartered for transportation of troops and munitions of war have not likewise been considered as a demise—in fact, always so held where nature of the service and attainment of the object of the voyage render the charterers absolute command and control necessary."

Subjecting the facts in this case to the decisions cited in so far as the charter party is concerned, it is a contract not for service but is a demise of the tugs.

From the moment that these tugs were turned over to the Army Transport Service in pursuance of the contract they were under the absolute command and control of the officers of that service.

48 The court finds as a fact that these tugs were subject at all times to the orders and directions of the officers of the Government, and that the plaintiff did not interfere with or direct the operations of the tugs. The very nature of the service to be rendered was such as to require these tugs to be absolutely under the control and subject to the orders of the officers of the Army Transport Serv-

ice. The action of the parties in the execution of the contract showed that the plaintiff surrendered the possession, command, and control of the tugs to the officers of the Government; that this surrender was required and expected; and that the officers of the Army Transport Service took charge of the tugs, navigated them, controlled them, and had absolute possession of them.

Under the law and the facts we are of opinion that the Government had no right to make the deductions complained of. A judgment will be entered for the plaintiff in the sum of $24,822.48. It is so ordered.

Graham, judge; Downey, judge; and Campbell, chief justice, concur.

Dissenting opinion

Booth, judge, dissenting:

My inability to assent to the foregoing judgment rests upon a belief that the transaction involved was a mere contract for service and not a demise of the boats. The numerous letters and acceptances which make up the contract nowhere expressly characterize it as either a contract for service or a demise of the boats; so under the decisions of the Supreme Court the question must be determined by an examination of the contracts and the conduct of the parties thereunder, always giving a construction adverse to a demise of the boats when the issue is doubtful, the courts uniformly leaning towards a contract for service rather than a demise of the vessel. Leary v. United States, 14 Wall. 607; United States v. Shea, 152 U. S. 178; Reed v. United States, 11 Wall. 591; Donald v. United States, 39 C. Cls. 357.

The rule of law applicable to an ascertainment of the difference between a contract of affreightment and a demise of a vessel is that if the control, possession, command, and navigation of the vessel passes to the charterer, and he becomes pro hac vice the owner of the same, then the transaction is a demise of the vessel, otherwise it is a mere contract for service. In one instance the parties contemplate a lease of the vessel and all that goes therewith, casting full responsibility on the owner pro hac vice. In the other, the owner engages to perform a stated service with his vessel for a stated rate of pay.

The findings disclose, first, that the service to be rendered was a per diem towage service, to be paid for by the day, for a stated period of time. It may not be successfully contended that as to the twelve-hour boats the Government assumed any responsibility for them during the night. At the close of the twelve-hour day they must of necessity be within the ownership of the plaintiff company. Such a contract and such a service is directly in conflict with the idea of a demise of the boats. Second, the plaintiff company agreed to furnish everything for the boats except coal and water, and even coal was to be furnished by the plaintiff, i. e., loaded upon the tugs at

the cost of the defendant. Furnishing everything included
49 the crew, the one essential element of navigation. Assuredly it is manifest that the defendant had no primary authority or jurisdiction over the crew. The defendant could do no more than direct the commander what cargo to take and where to go to discharge it. The defendant was without authority to enforce discipline with respect to the crew, and could not discharge a member thereof or supply a vacancy therein. One, if not the most serious, complaint of the defendant was lack of sufficient and competent crews. The plaintiff company at no time refused to acknowledge this responsibility. It is nowhere disputed that the plaintiff company employed and paid the crews and that the crews navigated the boats in accord with their judgment and experience as navigators. If the defendant was the owner of the boats pro hac vice, this one stipulation of the contracts is obviously contrary to the usual ones, wherein a demise of a vessel has been held.

An examination of the cases discloses that in cases of a demise of the vessel the owner parts with all control over the same, and he is as effectually dispossessed, for the time being, of the vessel as if he had sold the same. The charterer becomes responsible for all that happens during the life of the charter party and is vested with all the authority and power of an owner.

Nothing militates more strongly against the plaintiff's contention than the fact that it, through is own crews, navigated the boats between the points necessary to perform the required service, free from the jurisdicition and authority of the defendant. The crews were the agents of the plaintiff and not the defendant.

Third. The plaintiff company assumed and performed the duty of keeping the boats in condition during the time mentioned in the contract. Once in every thirty days it expressly covenanted to "wash the boilers to maintain operating efficiency." The plaintiff installed at its own expense, during the contract period, a fire-extinguishing apparatus and added an additional member to the crews. Surely, if the defendant was lawfully in possession as owner, this burden would have been cast on it. Operating efficiency was no concern of the plaintiff company if the defendant was operating the boats as owner thereof. If the defendant took the boats over and was operating them, the duty of keeping them in repair and good order belonged to it, and the cases so hold.

Fourth. The parties themselves have by their own conduct construed the contracts as one for service and not as a demise of the vessels. The "Ira M. Hedges" sank while towing a barge of coal from Perth Amboy, N. J., to the Erie Basin Dry Dock, and the plaintiff company, at its own expense, raised and repaired her. Such a manifestation of ownership and the assumption of the responsibilities of ownership indisputably stamp the transaction as a direct and unequivocable acknowledgment that title and possession

of the boats remained in the plaintiff company. No claim is made in this suit for the expense incurred in this respect and possession may have been said or done at the time the plaintiff company did as set forth above, and paid the damages incident to the event. The available cases, without exception, in charter parties construed as a demise of a vessel hold that in cases of collision and sinking the pro hac vice owner is responsible for the losses occasioned thereby. Plant Investment Co. *v.* United States, 45 C. Cls. 374.

50 The "Hedges" was in the physical possession of the plaintiff company during the whole period of her reconditioning. She was of no service to the defendant for a little over fifty-four days out of the charter party time, at a per diem expense of $150 a day, or more than $8,100, being in actual use but twenty-six days out of the full time required. While this is the most aggravated incident of the entire transaction, it necessarily impresses as a clear recognition by the plaintiff company of its legal liability under the contracts to assume the burdens of the actual navigation of the boats. The defendant was in urgent need of tug service, the war required the use of every available instrumentality to get the Army overseas, and it is not to be presumed that it would have allowed, under the contracts, this degree of remissness if both the opportunity and the power and authority existed to forestall it. It might have taken over the boats as it did other shipping facilities, and thereby left no doubt as to the character of the transaction. However, in my opinion, it pursued the opposite course and simply employed the vessels for a stated per diem service and a stated per diem rate of pay, without the assumption of title and the correlative responsibilities of an owner pro hac vice.

Finding V, if I correctly understand it, is simply intended to disclose the service rendered by the boats, i. e., that while engaged in the service contracted for the defendant had the use of the boats and gave explicit orders as to what towage they were to do, and of course, while so engaged, they were under the exclusive orders of the defendant. The plaintiff could not avail itself of the boats during this period in any other towage service without violating its contracts. The decided cases, however, do not hold facts of this nature as determinative of the issue involved. It is self-evident that under a contract for service the defendant would necessarily have the direction of the boats, and under the terms of the contracts they were subject at all times stated in the contracts to its orders. They were employed by the defendant to do such towage service as it directed. These facts, however, do not convert a contract for service of the boats into a demise of the same. The mere giving of orders as to what barges should be towed, when they should be towed, and by what boats, from point to point, is not in law sufficient to characterize the transaction as taking that measure of control over the boats contemplated in a demise of the same.

The plaintiff's crews navigated the boats during all the period of time covered by the contracts. The boats were in the possession of

crews employed and paid for by the plaintiff; agents of the plaintiff operated the boats; they directed their course from point of departure to destination through the waters of the harbor; they, as agents of the plaintiff, were responsible for the safety of the boats and cargo aboard. No one might contend that the defendant assumed responsibility for the safe navigation of a boat, when it was without authority to select or discharge the crew which was to navigate it. As was said in Pollock *v.* Cleveland Shipbuilding Co., 56 Ohio St. 655:

"Navigation is the science or art of conducting a ship from one place to another, and the science or art of ascertaining the
51 position and directing the course of vessels, especially at sea, by astronomical operations or calculations; a nautical science or art; shipping."

Towage service by tugboats is not the kind of marine service usually involving a demise of tugboats. The very nature of the service itself does not, unless especially contracted for, suggest a taking over of the boats themselves. In the ordinary course of business it would be considered a hired service and no more. The cargo transported is usually aboard a transport of the charterer, and the service of the boats is limited to towing the same from point of embarkation to point of discharge. The crew of the tug navigates the same, and the crew of the transport navigates it in keeping with the tug's course.

APPENDIX TO FINDING III

Statement of accounts of Cornell Steamboat Co. for hire of tugs to Army Transport Service, New York

JANUARY, 1918

1	2	3	4	5	6	6	Deductions		10	11	12	13
Name of tug	Number of days chartered	Rate	Amount	Coal	Water	Total	8 Number of hours off duty	9 Rate per hour	Amount	Amount paid on account	Amount due	Overpaid
Ellen M. Ronan	31	24 hrs., $150.00	$4,650.00	$1,170.00	$43.50	$5,863.50	192	6.25	$1,200.00	$4,663.50		
Ira M. Hedges	31	24 hrs., 150.00	4,650.00	455.00	7.50	5,112.50	552	6.25	3,450.00	3,450.00	$1,662.50	
S. L. Crosby	1	24 hrs., 150.00	150.00	65.00	1.50	216.50	12	6.25	75.00	141.50		
G. W. Decker	4	24 hrs., 150.00	600.00	195.00	4.50	799.50	12	6.25	75.00	724.50		
H. D. Mould	23	12 hrs., 100.00	2,450.00	32.50	1.50	2,484.00	71	8.33	591.67	1,892.33		
Do	1	24 hrs., 150.00										
Wilson P. Foss	30	12 hrs., 80.00	2,550.00	507.00	46.50	3,103.50	41	6.66	273.30	2,697.25	132.95	
Do	1	24 hrs., 150.00										
E. J. Foster	25	12 hrs., 75.00	2,775.00	617.00	46.50	3,438.50	24	6.25	150.00	3,138.50	150.00	
Do	6	24 hrs., 150.00										
Victoria	31	24 hrs., 150.00	4,650.00	1,046.50	39.00	5,735.50	100½	6.25	628.12	5,185.50		$78.12
J. G. Rose	31	24 hrs., 150.00	4,650.00	663.00	37.50	5,350.00	126	6.25	787.50	4,563.00		
Charlie Lawrence	11	12 hrs., 75.00	1,125.00	357.50	19.50	1,502.00	17	6.25	106.25	1,352.00	43.75	
Do	2	24 hrs., 150.00										
Primrose	6	12 hrs., 75.00	4,200.00	1,144.00	45.00	5,389.00	20	6.25	125.00	5,214.00	50.00	
Do	25	24 hrs., 150.00										
	164	24 hrs., 150.00					71	8.23				
	30	12 hrs., 80.00					1,096	6.25				
	42	12 hrs., 75.00					41	6.66				
	23	12 hrs., 100.00										
Total	259		32,450.00	6,252.50	246.00	38,999.00			7,461.84	33,022.08	376.70	1,865.62

APPENDIX TO FINDING III—Continued

Statement of accounts of Cornell Steamboat Co. for hire of tugs to Army Transport Service, New York—Continued

FEBRUARY, 1918

1	2	3	4	5	6	7	Deductions		10	11	12	13
Name of tug	Number of days chartered	Rate	Amount	Coal	Water	Total	8 Number of hours off duty	9 Rate per hour	Amount	Amount paid on account	Amount due	Overpaid
Foss, W. P.	28	12 hrs., $80.00	$2,240.00	$396.50	$42.00	$2,678.50	60	6.66	$3,999.60	$2,438.50		$159.60
Foster, R. J.	28	12 hrs., 75.00	2,100.00	429.00	42.00	2,571.00	48	6.25	300.00	2,271.00		
Hedges, Ira M.	28	24 hrs., 150.00	4,200.00			4,200.00	576	6.25	3,600.00	600.00		
Mould, H. D.	28	12 hrs., 100.00	2,800.00			2,800.00	84	8.33	700.00	2,100.28		.28
Primrose	28	24 hrs., 150.00	4,200.00	754.00	34.50	4,988.50	153	6.25	956.25	4,032.25		
Ronan, E. M.	28	24 hrs., 150.00	4,200.00	227.50	39.00	4,466.50	59	6.25	368.75	4,104.00		6.25
Rose, J. G.	28	24 hrs., 150.00	4,200.00	487.50	37.50	4,725.00	12	6.25	75.00	4,650.00		
Victoria	28	24 hrs., 150.00	4,200.00	845.00	37.50	5,082.50	48	6.25	300.00	4,782.50		

MARCH, 1918

Foss, W. P.	31	12 hrs., $80.00	$2,480.00	$493.00	$46.50	$3,019.50	96	6.66	$640.00	$2,436.17		$56.67
Foster, R. J.	31	12 hrs., 75.00	2,325.00	536.50	46.50	2,908.50	52	6.25	325.00	2,583.00		
Primrose	31	24 hrs., 150.00	4,650.00	1,073.00	44.50	5,767.50	252	6.25	1,575.00	4,986.25		793.75
Hedges, Ira M.	31	24 hrs., 150.00	4,650.00		36.00	4,686.00	90	6.25	550.00	4,123.50	$12.50	
Ronan, E. M.	31	24 hrs., 150.00	4,650.00		39.60	4,689.60	108	6.25	576.56	4,036.88		12.44
Rose, J. G.	31	24 hrs., 150.00	4,650.00	1,029.50	37.40	5,717.00	194	6.25	1,215.62	4,907.63		406.25
Victoria	31	24 hrs., 150.00	4,650.00	986.00	36.00	5,672.00	168	6.25	1,050.00	4,625.13		3.13
	295	24 hrs., 150.00					1,760	6.25				
	59	12 hrs., 80.00					156	6.66				
	28	12 hrs., 100.00					84	8.33				
	59	12 hrs., 75.00										
Total	441		64,735.00	7,257.50	518.50	63,971.50			12,731.78	52,677.09	12.50	1,438.37

APRIL, 1918

Foss, W. P.	30	12 hrs., $80.00	$2,400.00	$487.50	$45.00	$2,932.50	150	6.66	$1,000.00	$2,166.90		$234.40
Foster, R. J.	30	12 hrs., 75.00	2,250.00	510.00	45.00	2,805.00	132	6.25	825.00	1,980.00		
Primrose	11	24 hrs., 150.00	1,650.00	112.50	45.50	1,767.00	239	6.25	1,493.75	273.25		
Hedges, Ira M.	11	24 hrs., 150.00	1,650.00		16.50	1,666.50	180	6.25	1,125.00	541.50		
Ronan, E. M.	11	24 hrs., 150.00	1,650.00		16.50	1,666.50	14	6.25	87.50	1,579.00		

MAY, 1918

Foss, W. P.	31	12 hrs., $80.00	$2,480.00	$472.50	$46.50	$2,999.00	48	6.66	$320.00	$2,679.00		
Foster, R. J.	31	12 hrs., 75.00	2,325.00	487.50	46.50	2,859.00	72	6.25	450.00	2,484.00		$75.00

JUNE, 1918

Foss, W. P.	30	12 hrs., $80.00	$2,400.00	$457.50	$45.00	$2,902.50	72	6.66	$480.00	$2,502.50		$80.00
Foster, R. J.	[1] 31	12 hrs., 75.00	2,325.00	502.50	46.50	2,874.00	60	6.25	375.00	2,499.00		
	33	24 hrs., 150.00					270	6.66				
	91	12 hrs., 80.00					697	6.25				
	92	12 hrs., 75.00										
Total	216		19,130.00	3,930.00	312.00	22,472.00			6,156.25	16,705.15		389.40
	492	24 hrs., 150.00					155	8.33				
	180	12 hrs., 80.00					426	6.66				
	51	12 hrs., 100.00					3,594	6.25				
	193	12 hrs., 75.00										
Grand total	916		116,315.00	16,540.00	1,076.50	125,442.50	4,175		26,349.87	102,404.32	$389.20	3,693.39
Balance due U. S. Government.										1,782.50		3,304.19
												1,787.50
										100,621.82		
												1,516.69

[1] Foster includes July 1, when charter expired.

55 V. *Judgment*

At a Court of Claims held in the city of Washington on the twenty-ninth day of October, A. D. 1923, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of twenty-four thousand eight hundred and twenty-two dollars and forty-eight cents ($24,822.48).

By the Court.

VI. *Defendant's application for appeal*

From the judgment rendered in the above-entitled cause on the 29th day of October, 1923, in favor of the claimant, the defendants, by their Attorney General, on the 11th day of January, 1924, make application for, and give notice of an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed, Jan. 11, 1924.

VII. *Order of court allowing defendant's application for appeal*

It is ordered by the court that the defendant's application for appeal be and the same is allowed.

Entered January 21, 1924.

56 In Court of Claims of the United States

[Title omitted.]

Clerk's certificate

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the defendant's application for an appeal; of the order of the court allowing defendant's application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this twenty-fourth day of January, A. D. 1924.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

[Indorsed on cover: File No. 30082. Court of Claims. Term No. 265. The United States, appellant, *vs.* Cornell Steamboat Company. Filed January 26, 1924. File No. 30082]

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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
CORNELL STEAMBOAT COMPANY, APPELLEE } No. 265

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

This is an appeal from the judgment of the Court of Claims in favor of a tugboat owner for $24,822.24.

The Cornell Steamboat Company, during 1917 and 1918, by informal charters evidenced by letters, chartered to the War Department 12 tugboats for use in shifting and towing government vessels about the harbor of New York. The hire was a per diem rate. When the tug carried a single crew this rate was for 12 hours' service; when the tug carried a double crew, for 24 hours' service. The owner agreed "to find everything in connection with their maintenance and operation, excepting coal and water." In some instances it furnished

coal and the government was charged for the coal used. The owner selected and appointed the officers and crews of the tugs and they were subject to dismissal or discipline only by it. The owner provisioned and supplied the tugs, except with coal and water, and assumed and performed the duty of maintaining the tugs in efficient order and condition. The tugs were employed in the harbor-towing service only. Following the usual practices, whether the hiring be for a trip, hour, day, or month, the government gave all necessary instructions as to vessels to be moved or shifted. The actual navigation rested with the officers and crew who were appointed and paid by the owner. In the performance of these duties, we say the officers and crew represented the owner. The *Ira M. Hedges,* one of the tugs, sank, and the owner, at its own expense, raised and repaired the vessel. This occupied 54 days.

Although the charter rate was on a daily basis, the accounts were submitted monthly. The government deducted from the monthly accounts, which covered hire for the 30 or 31 days each month, the sum of $8,100, representing the hire of the *Hedges* billed for the 54 days at $150 per day during which the tug was raised and repaired (she was in actual use only 26 days in all). The government made deductions for time lost when the tugs reported with short crews or when they were not in condition to perform service or if too long

a time was consumed in taking aboard the supplies furnished by the owners. (Findings of fact III and IV; R. p. 25.) These deductions totaled $24,822.48. These deductions were made and notice thereof given the owner as the monthly accounts were submitted. The government paid the balance and the owner accepted the amount under protest. The government at the time regarded the tugs hired upon a service basis, with the owner remaining responsible for the operation, control, and navigation of the tugs through the officers and crews, their servants. It does not appear that owners at that time expressed the opinion that the tugs were demised, which was the position later taken by them.

The owner's present claim was to recover the moneys which the Government disallowed. The majority opinion of the Court of Claims (Hay, J.) determined that the contract for the use of the tugs constituted a demise of the tugs to the government—owner *pro hac vice*—and the government was responsible for the hire of the tugs for the full periods. Judgment was entered for the full claim, including $8,100 hire for the period the *Hedges* was repaired by owners.

The dissenting opinion (Booth, J.) after making a most careful review and application of the facts, concludes that the contract for the use of the tugs was a contract for service upon a daily basis and not a demise of the boats, with a duty

upon the owner to man, equip, navigate, maintain in good order and repair, and to provide efficient operation. In this view, as the deductions related to owner's breach of contract to have tugs in working order and condition, such deductions were proper.

This appeal, the government suggests, presents the issue whether the charter arrangements, evidenced by the informal written contracts and the conduct of the parties thereunder, constitute a contract for service and not a demise of the tugs as the majority opinion of the Court of Claims has found. The government suggests the facts bring the case squarely within the rulings of this Court in *New Orleans-Belize Royal Mail S. S. Co., Ltd.*, v. *United States,* 239 U. S. 202.

The issues thus are presented.

ARGUMENT

We apply the rule announced in this court in *New Orleans-Belize Royal Mail and Central American S. S. Co., Ltd.*, v. *United States,* 239 U. S. 202, 206, as definitely determining that the charters of the tugs in this case were contracts for hire and did not constitute a demise of the tugs. In denying that the charter party constituted a demise of the vessel, this court observed (Mr. Justice Holmes):

> The general owner furnished the crew and a master who at least regarded himself as representing its interests since he protested against commands that he received.

> * * * We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person (citing cases). We conclude that the possession followed the navigation and control. The case resembles *Morgan* v. *United States,* 14 Wall. 531, not *United States* v. *Shea,* 152 U. S. 178, as in the latter it was found that the vessel was under the exclusive management and control of the Quartermaster's Department.

In *The Spokane* (C. C. A., 2nd Cir. 1923), 294 Fed. 242, the court said (p. 246):

> * * * It (charterer) did not have common possession or control of the navigation or operation of the vessel. There was no demising or letting of the vessel itself. The charter vested in the charterer no possession or custody of the steamer, with the rights or obligations incident to a demise or possession. It was simply a contract of affreightment for a period of time—the navigation season of 1920—at a stipulated price per day, with the owner agreeing to furnish the ship fully manned and equipped, and at the owner's expense to maintain and operate it in carrying cargoes of automobiles or other cargoes to be furnished by the charterer. Since it appears that the possession was at all time in the appellee (owner), but the actual custody was in the ship's master,

who was selected and paid by the owner, and who in turn hired the crew and controlled the management and navigation of the ship, no liability for this act of negligence can be imposed upon the charterer.

In *Bramble* v. *Culmer,* 78 Fed. 497 (C. C. A., 4th Cir. 1897) (p. 501):

> It is the general and unvarying incident of all charter parties that the owners of vessels are charged with the duty of navigating them and parties must, in reason, be understood to contract with reference to such obligation, unless it is excluded by special contract or necessary implication. It is not contended here that there was any express contract at the time the vessel was chartered in which the charterers undertook to navigate the vessel. The master, mate, and crew were selected by the owners and paid by them. The charterers undertook to pay a lump sum for the voyage, which sum was divided between the owners and the crew in the proportion before stated. This was but an ordinary contract of affreightment and if the schooner had been lost on the way out to Tarpum Bay, there could have been no pretense that the charterers were liable. * * *
>
> When a shipowner agrees to carry goods by water, or to furnish a ship for the purpose of carrying goods in return for a sum of money to be paid to him, such contract is called a " contract of affreightment." The charterer thereby acquires the right to the

temporary use of the vessel for the carriage of his goods, but the control and possession of the vessel remain in the owner, through the master and crew, who continue to be his servants. When a ship is let to another for a period of time and the owner during that time has nothing whatever to do with the appointment of her officers and crew, or with the working or management of her, that is called a " demise " or " letting " of the ship. * * *

The result of all the cases seems to be this: Wherever the shipowner undertakes to act as carrier of goods, and appoints the master and crew, the responsibility for her safe navigation rests upon him; but wherever the ship is completely transferred to the hirer for a period of time, and the shipowner has nothing whatever to do with the appointment of her officers and crew, then the charterer becomes responsible for her navigation.

In *Clyde Commercial S. S. Co.* v. *West India S. S. Co.* (C. C. A., 2nd Cir. 1909), 169 Fed. 275, the rule is thus stated by Ward, C. J., speaking for the court (p. 277):

It will thus be seen that the owner officered, manned, and provisioned the vessel, was in entire control of her navigation, and bound to maintain her during the charter party in good condition. The expression " delivery " of the vessel to the charterer and " delivery " by it at the end of the term to the owner is to be construed in connection

> with these provisions and with the further provision that she was to be " placed at the disposal of the charterers " to the extent of the space agreed upon. We entertain no doubt that the charter did not amount to a demise of the vessel. *Reed* v. *United States,* 78 U. S. 591, 20 L. Ed. 220; *United States* v. *Shea,* 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403. *If she had been at fault for a collision during the term, it would scarcely be contended that the charterers would be personally responsible.* [Italics ours.]

We examine the facts.

The agreements or charters consist of letters of proposal and acceptances which vary in their wordings. We observe these wordings as indicating the purposes intended by the parties (R. p. 16):

> We confirm our verbal arrangements * * * to charter to you the Tug *Primrose* * * * and the Tug *Charlie Lawrence* * * * with a single crew and everything found, excepting coal and water, which you (government) are to furnish, at the rate of $75 for each and every day per tug. * * *
>
> (R. p. 17) Tugs *John T. Welch* and *Ellen M. Ronan:* The price of the *John T. Welch* to be $80 per 12-hour day * * * the price of the *Ellen M. Ronan* to be $150 per day * * * We (owners) are to furnish everything for these tugs, with the exception of coal and water, which you are to furnish.

Victoria (p. 19): The price to be $150 per 24-hour day for each and every day of the charter period; *we to supply everything in connection with her maintenance and operation, with the exception of coal and water, which you are to furnish.* [Italics ours.]

The government's acceptance reads in part (R. p. 19):

It is understood that *you will supply double crew and everything in connection with her maintenance and operation, with the exception of coal and water, which is to be furnished by this service.*

Wilson P. Foss (R. p. 20): We (owners) will charter to you the Tug *Wilson P. Foss* for use at the Hoboken Army piers for $80 per day; *we to furnish everything in connection with her maintenance and operation,* with the exception of coal and water, which you are to furnish. The *Foss* is to operate with a single crew.

J. G. Rose (p. 22): It is agreed that we (owners) are to furnish her with a double crew for 24 hours service and *to find everything in connection with her operation* with the exception of coal and water which you are to furnish. The price is $150 per day of 24 hours for each and every day of the charter. * * * It is agreed that the said Tug *J. G. Rose* shall be allowed one day in each 30 to wash boiler and that this wash boiler day shall be paid for at the foregoing rate of hire. * * *

Tug *S. L. Crosby* (p. 23): *We to furnish everything* with the exception of coal and water which you will furnish.

R. J. Foster: We will have a double crew on the Tug *R. J. Foster* to-night so that her rate from this time on until such time as she is singled down again, and in your service, will be $150 per day. * * * We will deliver to him to-morrow upon his request the Tug *W. H. Baldwin,* single crew *to work at $75 per day,* you to furnish the fuel.

Charlie Lawrence (p. 24): We (owner) delivered to you to-day the Tug *Charlie Lawrence* to work as long as you may need her at the rate of $75 per day, we to furnish everything in connection with her operation, with the exception of coal and water. * * * We will deliver to you to-morrow (January 27) the Tug *G. W. Decker* to work double crew for such time as you may need her at the rate of $150 per day, you to furnish coal and water, and if we furnish the coal and water, it will be charged to you at the cost aboard the tug. Please understand that the *Charlie Lawrence* operates with a single crew.

These special arrangements intend the charter of the use of tugs, some for a day of 12 hours, others for a day of 24 hours, at a daily rate. We do not believe that for boats let for only a 12-hour period per day, the government assumed any responsibility for them during the night, when they were off of service. To charge the government with such liability there would have to be a direct

agreement imposing such liability upon the government. The letting for a 12-hour day is inconsistent with the reading that the contract amounted to a demise of the boat.

Thus the owner, by express terms, agreed to supply everything in connection with the *maintenance and operation* of the tugs, with the exception of coal and water, which the government was to furnish. The owner thereby undertook to provide and pay the crew. The charterer was without authority to nominate or select the officers and crew or to discharge or discipline them. The owner provided subsistence for the crew, ship's stores, including oil for engines and machinery, assumed all responsibility for keeping the tugs equipped and in proper running order and condition without limitations of any kind or character.

The owner adopted the practice of submitting accounts monthly. The hire of the tugs continued from January to June. When monthly accounts were submitted, which covered full 30 to 31 days, the government made deductions covering periods of time, when one of the tugs reported with a short crew or not in condition to perform the service required and if too long a time was consumed in the opinion of the officer in charge when taking on supplies. Notice thereof was given the owner. This practice clearly denies that the government considered the agreement a demise of the vessel. To the contrary it insisted that the owner properly man and equip its tugs as provided and it denied

the right to discipline the crews for lax attention in the handling of the tugs; rather it imposed upon the tugboat owner penalties for its failing to provide full crews and to discipline the officers and crew, which it regarded owner's duty to do. Although the deductions were accepted under protest, there is no suggestion by owner, so far as this record shows, that it insisted that the arrangement was a demise of the tugs.

Again (R. p. 25), when the Tug *Ira Hedges* sank (details not stated by the finding), the owner at its own expense raised the vessel and repaired it. This it was bound to do by the terms of the charter. If the charter is to be read as a demise of the tugs, such loss would have been borne by the government as *pro hac vice* owner and not by the owner. The owner promptly arranged for the raising and repair of the tug at its own expense. This definitely must determine that the hiring of the tugs did not constitute a demise. The tug was in the physical possession of owners during the period of raising and repairs, covering 54 days. The present claim allowed by the court includes the payment of charter hire for these 54 days, totalling $8,100. The tug was only in service 26 days.

The services for which the use of the tugs was secured is the customary service for harbor tugs whether upon the hourly, daily, monthly or yearly basis, and intended their employment in the shifting of vessels from one point in the harbor to an-

other. Directions as to what vessels shall be moved and from where and to where are always given by the charterer. In such uses the master and crew exercise their own judgment and experience as navigators and tugboat men and the success of their operations depended upon proper experience and the exercise of good judgment. We do not believe that had any of the tugs done damage to third vessels through negligent maneuvering on the part of the masters and crews of the tugs that any one would have considered, under the terms of these contracts, holding the Government responsible for the negligent acts of such officers and crews. We read the arrangement to require owners to bear the responsibility for such losses. If the contract is to be considered a demise, the Government would be responsible for such losses.

It is common knowledge that tugs employed in harbor service keep a log of the movements of the tug and the services they perform covering every day, whether the tugs are in the service of the owners or if they are hired to others. The fact that such logs were kept under the direction of the Army Transport Service can not be considered a factor determining the arrangements a demise. To the contrary, as the transportation service did require such logs to be kept so as to check up on tugs' performances and made deductions by the showings of the logs because owner failed to provide full crews or to properly maintain the boat, these requirements rather establishes the arrangement to

be one of hiring and not of demise. As indicated, the owner assumed and performed the duty of keeping the boats efficient for the service. With respect to one of the tugs (Tug *J. G. Rose,* R. p. 22) it provided that the tug " shall be allowed one day in each 30 to wash boiler and that this wash boiler day shall be paid for at the foregoing rate of hire." This suggests that control over the operation and navigation of the tug at all times remained in the owner, otherwise there would be no reason for this arrangement. This is consistent with the finding of fact V as made by the Court of Claims. (R. p. 26.)

It is common knowledge that the government, during this period, in a large number of instances, took over tugs and other classes of vessel property by requisitioning the use of such vessels upon the bare-boat basis or by taking title. We believe that had the government intended its arrangement for the use of these tugs to amount to a demise that it would have adopted the plan for taking over the use of the vessel on the bare-boat basis under the same terms and arrangements which it did in respect to other tugs and vessels. We read the act of arranging for the use of these tugs in the informal way adopted to be a hiring of the service of the tugs, rather than a demise. The use to which the tugs were devoted is the common and usual use of harbor tugs at New York.

The rule is settled (*Reed* v. *United States,* 11 Wall, 591, 592):

> Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can be accomplished without the transfer of the vessel to the charterer.

The dissenting opinion by Judge Booth carefully reviews the facts and conduct of the parties as definitely determining the charter arrangements one for service and not a demise. The review states (pp. 29–31):

> The findings disclose, first, that the service to be rendered was a per diem towage service, to be paid for by the day, for a stated period of time. It may not be successfully contended that as to the twelve-hour boats the Government assumed any responsibility for them during the night. At the close of the twelve-hour day they must of necessity be within the ownership of the plaintiff company. Such a contract and such a service is directly in conflict with the idea of a demise of the boats. Second, the plaintiff company agreed to furnish everything for the boats except coal and water, and even coal was to be furnished by the plaintiff, i. e., loaded upon the tugs at the cost of the defendant. Furnishing everything included the crew, the one essential element of navigation. Assuredly it is manifest that the defendant had no primary authority or jurisdiction over the crew. The defendant could do no more than

direct the commander what cargo to take and where to go to discharge it. The defendant was without authority to enforce discipline with respect to the crew, and could not discharge a member thereof or supply a vacancy therein. One, if not the most serious, complaint of the defendant was lack of sufficient and competent crews. The plaintiff company at no time refused to acknowledge this responsibility. It is nowhere disputed that the plaintiff company employed and paid the crews and that the crews navigated the boats in accord with their judgment and experience as navigators. If the defendant was the owner of the boats pro hac vice, this one stipulation of the contracts is obviously contrary to the usual ones, wherein a demise of a vessel has been held.

An examination of the cases discloses that in cases of a demise of the vessel the owner parts with all control over the same, and he is as effectually dispossessed, for the time being, of the vessel as if he had sold the same. The charterer becomes responsible for all that happens during the life of the charter party and is vested with all the authority and power of an owner.

Nothing militates more strongly against the plaintiff's contention than the fact that it, through its own crews, navigated the boats between the points necessary to perform the required service, free from the jurisdiction and authority of the defendant.

The crews were the agents of the plaintiff and not the defendant.

Third. The plaintiff company assumed and performed the duty of keeping the boats in condition during the time mentioned in the contract. Once in every thirty days it expressly covenanted to " wash the boilers to maintain operating efficiency." The plaintiff installed at its own expense, during the contract period, a fire-extinguishing apparatus and added an additional member to the crews. Surely, if the defendant was lawfully in possession as owner, this burden would have been cast on it. Operating efficiency was no concern of the plaintiff company if the defendant was operating the boats as owner thereof. If the defendant took the boats over and was operating them, the duty of keeping them in repair and good order belonged to it, and the cases so hold.

Fourth. The parties themselves have by their own conduct construed the contracts as one for service and not as a demise of the vessels. The *Ira M. Hedges* sank while towing a barge of coal from Perth Amboy, N. J., to the Erie Basin Dry Dock, and the plaintiff company, at its own expense, raised and repaired her. Such a manifestation of ownership and the assumption of the responsibilities of ownership indisputably stamp the transaction as a direct and unequivocable acknowledgment that title and possession of the boats remained in the plaintiff company. No claim is made in

this suit for the expense incurred in this respect and possession may have been said or done at the time the plaintiff company did as set forth above, and paid the damages incident to the event. The available cases, without exception, in charter parties construed as a demise of a vessel hold that in cases of collision and sinking the pro hac vice owner is responsible for the losses occasioned thereby. *Plant Investment Co.* v. *United States,* 45 C. Cls. 374.

The *Hedges* was in the physical possession of the plaintiff company during the whole period of her reconditioning. She *was of no service to the defendant for a little over fifty-four days out of the charter party time, at a per diem expense of $150 a day, or more than $8,100, being in actual use but twenty-six days out of the full time required.* While this is the most aggravated incident of the entire transaction, it necessarily impresses as a clear recognition by the plaintiff company of its legal liability under the contracts to assume the burdens of the actual navigation of the boats. The defendant was in urgent need of tug service. The war required the use of every available instrumentaility to get the Army overseas, and it is not to be presumed that it would have allowed, under the contracts, this degree of remissness if both the opportunity and the power and authorty existed to forestall it. It might have taken over the boats as it did other shipping facilities, and thereby left no doubt as to the character of the transac-

tion. However, in my opinion, it pursued the opposite course and simply employed the vessels for a stated per-diem service and a stated per-diem rate of pay, without the assumption of title and the correlative responsibilities of an owner *pro hac vice.*

Finding V, if I correctly understand it, is simply intended to disclose the service rendered by the boats, i. e., that while engaged in the service contracted for the defendant had the use of the boats and gave explicit orders as to what towage they were to do, and of course, while so engaged, they were under the exclusive orders of the defendant. The plaintiff could not avail itself of the boats during this period in any other towage service without violating its contract. The decided cases, however, do not hold facts of this nature as determinative of the issue involved. It is self-evident that under a contract for service the defendant would necessarily have the direction of the boats, and under the terms of the contracts they were subject at all times stated in the contracts to its orders. They were employed by the defendant to do such towage service as it directed. These facts, however, do not convert a contract for service of the boats into a demise of the same. The mere giving of orders as to what barges should be towed, when they should be towed, and by what boats, from point to point, is not in law sufficient to characterize the transaction as taking that measurement of

control over the boats contemplated in a demise of the same.

The plaintiff's crews navigated the boats during all the period of time covered by the contracts. The boats were in the possession of crews employed and paid for by the plaintiff; agents of the plaintiff operated the boats; they directed their course from point of departure to destination through the waters of the harbor; they, as agents of the plaintiff, were responsible for the safety of the boats and cargo aboard. No one might contend that the defendant assumed responsibility for the safe navigation of a boat, when it was without authority to select or discharge the crew which was to navigate it. As was said in *Pollock* v. *Cleveland Shipbuilding Co.,* 56 Ohio St. 655:

" Navigation is the science or art of conducting a ship from one place to another, and the science or art of ascertaining the position and directing the course of vessels, especially at sea, by astronomical operations or calculations; a nautical science or art; shipping."

Towage service by tugboats is not the kind of marine service usually involving a demise of tugboats. The very nature of the service itself does not, unless especially contracted for, suggest a taking over of the boats themselves. In the ordinary course of business it would be considered a hired service and no more. The cargo transported is usually aboard a transport of the charterer, and the service of the boats is limited to towing the

same from point of embarkation to point of discharge. The crew of the tug navigates the same, and the crew of the transport navigates it in keeping with the tug's course.

These reviews are in full accord with the decisions of this court in *Leary* v. *United States,* 14 Wall. 607; *Reed* v. *United States,* 11 Wall. 591; and of the previous rulings of the Court of Claims in *Donald* v. *United States,* 39 Ct. Cls. 357; *Plant Investment Co.* v. *United States,* 45 Ct. Cls. 374.

These reviews further emphasize that the facts and conduct of the parties determine the case to be ruled by the cases above cited and reviewed and not by *United States* v. *Shea,* 152 U. S. 178. In this latter case, the court (Justices Fuller and Jackson dissenting) admitted " the question is not free from doubt." The fact there controlling the opinion of the Court of Claims (p. 181) was that the Quartermaster in charge of the vessel demised, certified that the vessel was " in the exclusive control and management of the government, *being manned and navigated by employees of the quartermaster's department.*" The quartermaster's department also held the claim proper and just. The owner was to provide only engineer and fireman, the government to provide the master and crew. We read the facts to admit that the master and crew were provided by the quartermaster's department. Thus possession and control passed to that department. To constitute a demise the owner

must part with the " entire command and possession and consequent control over navigation."

If the charter be declared a contract for service rather than a demise, it follows the deductions are proper and the claim should be dismissed. If the owner failed to perform his undertaking to provide a full crew or to maintain and supply the vessels so as to enable them to perform the service, it would be responsible in damages for such breach measured, in this case, by the charter hire for such period. The tug could not be said to be placed in service or employed in service during such off periods. The same rule applies with respect to the period the owners had the tug during the period of her raising and repairs. The tug was not then " in service." *United States* v. *Shea*, 152 U. S. 178; *Clyde Commercial S. S. Co.* v. *West India S. S. Co.*, 169 Fed. 275, 277 (C. C. A. 2nd Cir. 1909).

CONCLUSION

The government suggests that the judgment of the Court of Claims should be reversed.

Respectfully,

JAMES M. BECK,
Solicitor General.

J. FRANK STALEY,
Special Assistant to the Attorney General in Admiralty.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES, APPELLANT
v.
CORNELL STEAMBOAT COMPANY, APPELLEE } No. 265

APPEAL FROM THE COURT OF CLAIMS

REPLY BRIEF OF THE UNITED STATES

We review the arrangements for the charters of the several tugs.

Tugs *Primrose* and *Charlie Lawrence:* By letter dated November 21, 1917, the owner agreed "to charter" the tugs "with a single crew and everything found except coal and water which you are to furnish at the rate of $75 for each and every day per tug, beginning November 22, 1917. It is understood that these two tugs are placed in service on trial for several days, and if they meet with your requirements, formal charter party will be executed for the hire of these tugs by you continually until June 1, 1918, at the same rate, with the privilege of renewal after that date."

By letter dated November 24, 1917, the Government accepted the charter "according to the conditions stated in your letter." No formal charters

thereafter ever were executed for these tugs. For six days the *Primrose* was a 12-hour tug at $75 per day and thereafter until April 11, 1918, a 24-hour tug. The tug *Charlie Lawrence* was in service 13 days in January, 1918. The deductions made for these tugs were:

Charlie Lawrence	$106.25
Primrose:	
December	125.00
February	956.25
March	1,575.00
April	1,493.75

The tugs *John T. Welch* and *Ellen M. Ronan* were chartered by letter dated December 1, 1917, and fixed at the rate as follows:

> Delivery * * * Dec. 3rd; extent of time, June 1st, 1918.
>
> The price of the *John T. Welch* to be $80 per 12-hour day for each and every day of the charter period. The price of the *Ellen M. Ronan* to be $150 per day of 24 hours for each and every day of the charter period.

The government on December 7, 1917, accepted these offers. The *Ellen M. Ronan* was in service 101 days, from January 1 to April 11, and the *John T. Welch* was not in service after January 1. From the hire of the *Ronan* deductions were made as follows:

January, 192 hours	$1,200.00
February, 59 hours	368.75
March, 108 hours	576.56
April, 14 hours	87.50

Tug *Ira M. Hedges:* The findings of the Court of Claims do not state the letter upon which the

Hedges was chartered. The exhibit to the petition (R. p. 2) agrees to charter the *Hedges* "to be chartered to you in all respects same as the tug *Ellen M. Ronan* at $159 per day * * * charter to be in all respects similar to letter of even date relative to the *Ellen M. Ronan.*" By reason of an accident, owner had the *Hedges* for purposes of repair for little over 54 days, and hire covering such period totaled $8,100, and the vessel was in actual use but 25 days out of her full service. The net deductions show:

January, 552 hours	$3,450
February, 576 hours	3,600
March, 90 hours	550
April, 180 hours	1,125

Victoria: By letter dated December 5, 1917, "time of charter to be from date of delivery until June 1, 1918 * * *. The price is to be $150 per day of 24 hours for each and every day of her charter period." Proposal accepted December 8, 1917 (R. p. 19). Vessel was in service from January 1 to March 31, 1918, and the deductions made were:

January, 100½ hours	$628.12
February, 48 hours	300.00
March, 168 hours	1,050.00

H. D. Mould: By letter dated December 19, 1917, owners stated the terms:

> This tug we understand to be only for temporary charter or use, so we give you the tug *H. D. Mould,* and the price will be $100 for each day of 12 hours, we to furnish everything in connection with her operation.

Letter of acceptance dated December 21, 1917, reads:

> In regard to your favor of the 18th instant regarding the use of the tugboat *H. D. Mould* at the Army Piers, hire for two or three days at $100 per day, you are advised that your offer is accepted.

The *Mould* was in service 23 days in January and 28 days in February and deductions were:

January, 71 hours	$591.67
February, 84 hours	700.00

Wilson P. Foss: By letter dated December 12, 1917, owners stated:

> We will charter to you the tug *Wilson P. Foss* for use at Hoboken Army Piers at $80 per day, we to furnish everything in connection with her maintenance and operation, with the exception of coal and water. * * * The *Foss* is to operate with a single crew. * * * The time of charter will be indeterminate, but we will endeavor to keep her there during the winter months and as long into the spring as we can spare her.

The *Foss* was in service from January 2 to July 1, 1918. The Government made deductions as follows:

January, 41 hours	$273.00
February, 60 hours	399.96
March, 96 hours	640.00
April, 150 hours	1,000.00
May, 48 hours	320.00
June, 72 hours	480.00

J. G. Rose: By letter dated December 31, 1917, the owners stated:

> We are to furnish her with a double crew for 24 hours' service and to find everything in connection with her operation. The price is $150 per day of 24 hours for each and every day of the charter. * * * It is agreed that the tug *J. G. Rose* shall be allowed one day in each 30 to wash boiler and that this wash-boiler day shall be paid for at the foregoing rate of hire.

On January 21, 1918, the government advised owner as follows:

> Your proposal * * * to charter the above tug to the Army Transport Service from date of delivery, December 31, 1917, to March 31, 1918, at a rate of $150 per 24-hour day, is hereby accepted.

Deductions for the *J. G. Rose* were made as follows:

January, 126 hours	$787.50
February, 12 hours	75.00
March, 194 hours	1,215.62

S. L. Crosby: By letter dated December 31, 1917, owners stated:

> We are delivering for one day's charter, double crew at $150 per day of 24 hours, we to furnish everything, with the exception of coal and water.

The proposal was accepted January 1 and the vessel was in service one day, for which the government claimed a deduction of 12 hours, or $75.

R. J. Foster: By letter dated January 11, 1918, owner stated:

> We will have a double crew on the tug *R. J. Foster* to-night so that her rate from this time on until such time as she is singled down again, and in your service, will be $150 per day. * * *

Acceptance was made under date of January 25, as follows:

> Your proposal of January 11 to charter the above tug at the rate of $150 per 24-hour day from January 12, 1918, to a date to be advised, is hereby accepted.

Deductions were made as follows:

January, 24 hours	$150
February, 48 hours	300
March, 52 hours	325
April, 132 hours	825
May, 72 hours	450
June, 60 hours	375

Charlie Lawrence: By letter dated January 26, 1918:

> We delivered to you today (January 26) the tug *Charlie Lawrence* to work as long as you need her at the rate of $75 per day, we to furnish everything in connection with her operation. * * *
>
> We will deliver to you tomorrow the tug *G. W. Decker* to work double crew for such time as you may need her at the rate of $150 per day. * * * Please understand that the *Charlie Lawrence* operates with a single crew.

On January 27, 1918, the government accepted the proposal for the tug *George W. Decker,* and it was in service 4 days in January. The government made deduction for 12 hours, or $75.

By finding III (R. p. 25) the deductions noted, save for the *Ira Hedges,* were made " if a tug reported with a short crew, or not in condition to perform the service required, or if too long a time was consumed in the opinion of the officer in charge when taking on supplies."

The larger deductions for the *Ira Hedges* (finding IV) relates to off hire during the period the tug was repairing due to her sinking. The tug was raised and repaired at owner's expense. The dissenting opinion suggests that these repairs covered a period of 54 days and the tug was only in use by the government 26 days out of the full period required. The doctrine of mutual covenants as applied to the facts requires the owner to furnish full crew and maintain the boat efficient for the service as a condition precedent to the right to hire, and therefore when the tugs were not so manned, equipped, and provided, charter hire for the period can not be collected.

The rule is stated in *Clyde Commercial S. S. Co.* v. *West India S. S. Co.,* 169 Fed. 275, 277 (C. C. A. 2nd Cir.):

> Irrespective of the special provisions and exceptions, there can be no doubt that, if the owner failed to perform any of its

> covenants, it would be responsible in damages to the charterer which might be measured in some cases by the charter hire and which in other cases might be more or less than the charter hire. If the charterer failed to perform its covenants, it would likewise be liable to the owner in damages, measured if the failure were in payment of the charter hire by the amount of hire unpaid with interest, or, if it were a failure to provide coals or pilots or pay port charges, measured by the amount of the damages so caused to the owner.

Whether this doctrine be applied as condition precedent or the claim be considered one for set-off or counterclaim, the deductions for hire during the period that the vessel was not manned nor maintained and supplied are proper.

We have made careful examination of the cases discussing right to make deductions for off hire where the terms of the charter party provide that hire shall be paid from the time that the vessel is delivered under the charter party until she be again returned to the owner. In these cases the parties have stipulated by special clause the conditions under which off hire shall be declared. The parties thus by special arrangement having stated when off hire is payable, the courts have construed the off-hire exceptions to be exclusive and deny the right to deduct hire for any cause not within the exceptions agreed upon. However, where the parties by special arrangement do not provide off-hire excep-

tions, the rule of mutual covenants, we have stated, must be applied, and, irrespective of an arrangement to pay continuous, if the owner is in default in the performance of duties which he has assumed, hire must be suspended.

In *United States* v. *Shea,* 153 U. S. 178, the exact question was presented, but discussed with reference to whether the charter was a demise or an arrangement for service. The court required hire to be paid because it concluded the charter arrangement constituted a demise. The reasoning suggests that if the arrangement had been otherwise, hire could not be recovered.

If the charter arrangement was a contract for service, as the owner then was responsible for safe navigation, the government should not be held responsible for hire during the period of raising and repairing where the accident happened through the fault of the owner's servants. In this respect, while the general principles otherwise stated in *Havelock* v. *Geddes,* 10 East 555, at page 564, are sound, at page 566 the application of the agreement to pay hire is conditioned upon the fact that the vessel is not fit for service owing to any default of the owner. If the charter be construed a contract for service, as the vessel sank while navigated by the servants of the owner, such sinking must be said to be owing to the default of the owner. The *Hedges* then could not be employed under the charter through the neglect or fault of the owner. In this view, the owner can not recover hire during the

period of repairs. We emphasize, as we read the opinion, the court in *Havelock* v. *Geddes* would have denied hire during the period the vessel was repairing, had it appeared that the defect in the ship occurred through the default of the owner.

We also observe that the general arrangement made was that the price of the vessel "to be $150 per day of 24 hours for each and every day of the charter period." Unlike the usual provision, it is not an arrangement to pay hire from the time of the delivery of the vessel until her redelivery, but relates to each and every day of the charter period.

We suggest these conclusions:

(1) The contract is one for service of the tug and not a demise.

(2) The application of the doctrine of mutual covenants determines that deductions properly are made from hire for periods of time when the tugs were reported with short crews or not in condition to perform the service required and where too long a time was consumed in the opinion of the officer in charge when taking on supplies.

(3) As the contract was one for service of 24 hours per day, if the tug was not available for use because of accident occurring through the fault of the servants of the owner, hire does not become payable during period the vessel is not fit for service but is undergoing repairs.

The government understands there can be no dispute but that the owners selected and paid the

crew and furnished everything except coal and water. I do not think it is disputed that the cause of the sinking of the *Hedges* was in going ashore and stranding which presumably must be through the fault of the officers and crew of the tug. If the findings are not full and accurate in these particulars, it is believed the case should be remanded. The obligations of owners appear by the informal contracts, and the presumption is that the contracts were performed as the parties agreed they should be.

THE TEST WAS THE ARRANGEMENT CONTRACT FOR SERVICE

Upon the argument, after a careful analysis of a great many cases, we suggested that the most practical test to be applied for determining whether the charter is one of demise or one for service is the test laid down by Lord Esher in *Baumvoll Manufactur von Scheibler* v. *Gilchrist & Co.*, L. R. Q. B. D. (1892) 252, at pages 258 and 259, which we quote:

> The question then arises, When is the captain the owner's captain? He is the owner's captain if the owner appoints him and exercises authority over him, or has a right as between themselves to exercise that authority over him which an owner has ordinarily to exercise over his captain. I say "as between themselves," because the owner may have given a right to the charterer inconsistent with his exercise of that authority. Still, if the captain is the servant of the

owner, appointed by him on ordinary terms, the captain can not say, "You have no right to order me to do anything; you have transferred that right to some one else." He can not say that because he is the owner's servant, and the owner would have a right to dismiss him immediately if he did not obey his orders.

Then was this captain the captain of the owner? It seems to me, after listening to all the cases that have been cited from the time of Lord Ellenborough downwards, that through all the cases it has been assumed that the question depends, where other things are not in the way, upon this, whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or a demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship; and in such case the captain is not the captain of the owner, and if so he has no authority to bind the owner by any bill of lading or by any contract. I have said that this appears to me to go through all the cases, and I have pointed out passages in them all, beginning with the case of *Frazer* v. *Marsh* (1), decided by Lord Ellenborough when sitting in banco. There Lord Ellen-

> borough uses an expression which I think is the right one. He does not speak of " demise " but of " control and possession," for he says, " to say that the registered owner, who divests himself by the charter party of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the owner of the captain during the time, would be to push the effect of those acts much too far."

Judge Hough in the *Santona case,* 152 Fed. 516, 518, adopted the same views and said:

> The difficulty lies, not in the statement of the rule or the recognition of the consequences thereof, but in its application to the infinitely varying circumstances of contract between shipowners and charterers. It appears to me that the best test of the applicability of the rule to any given state of facts is to inquire whose were the agents who wrought the injury out of which the controversy in hand arose. It is the same inquiry put by Lord Esher, in 1 Q. B. 258: " When is the captain the owner's captain? " That question, as applied to this case, is: Was the mate, when tallying cargo, the owner's mate? And the answer to that question must be ascertained by considering the provisions of the charter party affecting the receipt, carriage, and delivery of cargo as between owner and charterer.
>
> Under the very ordinary form of time charter involved in this cause it shocks

knowledge common to all men acquainted with maritime business to say that the owner has surrendered the possession or control or command or navigation of his ship. But he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship is the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matter relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are the servants of the charterers. There is, in fact (to borrow a simile from another branch of the law), an estate carved out of the ship and handed over for a specified term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys and the use of the vessel, master, and crew for the advancement of the charterer's gains. It follows that when the mate was tallying cargo he was the charterer's mate, and the set-offs for shortage claimed by the respondent are disallowed.

The same rulings further are suggested in the *Omoa Coal & Iron Company* v. *Huntley*, L. R. 2 Common Pleas (1876) 464.

We therefore urge that the charter arrangements thus made can not be applied to transfer entire command and possession and consequent control over navigation of these tugs to the charterer.

The definite arrangement by owner is to man, equip, and provide everything, save coal and water. The government making deductions because full crews were not provided, etc., is a declaration that the government has not assumed control over the command of the tug. The owner is responsible for the appointment of the men, payment of their wages, and their discharge and discipline. It follows that the owner is responsible for the navigation of the tugs while thus under the control of the men so appointed and disciplined by it.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES OF AMERICA, Appellant, *against* CORNELL STEAMBOAT COMPANY, Appellee.	October Term, 1924. No. 265.

BRIEF FOR THE APPELLEE

STATEMENT

1. *This appeal, in effect, is a request for a reviewal of the lower court's findings of fact.*

In this action for a recovery of a balance of charter hire due under charters of certain steam tugs, the Court of Claims summarized the Government's defense as follows:

> "The United States defends this suit upon the ground that the owner did not part with the possession, command and navigation of the tugs during the period of the charter, but that it retained possession and command, and performed the specific service for which the tugs were let. It is claimed that the charter was for service and not a demise, and consequently that the Government had the right to make the deductions for the time the tugs were not at its disposal" (27).*

* Unless otherwise stated, the references are to the pages of the record before this court.

The Court of Claims *decided the facts* adversely to the Government, finding that the Army Transport Service *did* have the sole disposal of the tugs during the periods of the respective agreements; that the owner *did* part with the possession, command, and navigation of the tugs; and that the tugs *were* demised to the Government. (*Fifth Finding of Fact*, 26; *Opinion*, 28-29).

The Government's entire brief is devoted to an argument that the lower court erred in these findings, and again contends that there was not any demise. But that contention necessarily involves a complete reviewal of the evidence on which the Court of Claims based its findings of fact.

This is in opposition to the oft-restated rule, that an appeal to this Court from the Court of Claims brings up for review *only* the questions of law involved, and does *not* reopen the case as to the facts, as the findings of fact of the Court of Claims are deemed conclusive.

It is difficult to believe that there should be any departure from that rule here, where the Government did not except to the findings of fact of the lower court, and where the Government's record on appeal *does not contain the testimony on which the lower court based its findings of fact.*

We respectfully submit that this ground, aside from any other, is sufficient to warrant a dismissal of the appeal.

2. *The nature of the claim, and the contracts on which it rests.*

In 1917 and 1918, Cornell Steamboat Company, as owner, chartered to the United States certain tugboats for varying agreed periods of time, to be used, operated, and controlled by the Army Transport Service at New York (16-25).

The Government, expressly, and in the plainest language, agreed and contracted to pay hire *continuously*, at a specified rate per day, *during the entire period* referred to in each charter; and the contracts did not contain any exceptions authorizing any deductions whatsoever (16-25).

Except for the first month (when hire was paid in full as billed under the contracts), the Government did *not* pay the continuous hire in full, but made certain deductions for varying numbers of days, hours, and even half hours (*Third Finding of Fact*, 25; Tables 33-35).

The simple question therefore arises:

> "How can the Government justify these deductions in the face of its plain agreement to pay the hire continuously, for the entire charter periods, without any deductions whatsoever?"

The answer to this question is that the deductions *cannot* be justified, because the agreements did not contain any exceptions or provisions for suspension of hire.

The charter agreements, which were contained in letters exchanged between the parties, (16-25), specified the tug involved in each agreement, and the length of the period for which the tug was being chartered; and specifically provided for an agreed rate of charter hire "for each and every day of the charter period" (16-25).

These facts appear in the letters written by Cornell Steamboat Company (*Second Finding of Fact,* 16-25), and are summarized in the opinion of the Court of Claims, at page 26, as follows:

> "All the boats hired by the Government were hired upon the same terms, and it was provided in the contract that *per diem* hire should be paid to the plaintiff *for each and every day of the charter period.*" (Italics ours.)

Schedules L. 1-L. 7, summarizing the deductions, both by the month and by the tug, were annexed to the petition in the Court of Claims, and will be found at pages 13 and 14 of the record.

Certain of the tugs involved were known as "single crew" tugs operating for only twelve hours per day, and others, known as "double crew" tugs, operated twenty-four hours per day. The rate of hire under the charters varied according to whether the tug was a "single crew" or a "double crew" tug (16-25). It will be observed that the Government had the complete use of the 12 hour tugs, just as much as it did of the 24 hour tugs.

3. *The Government's contention.*

In the lower court (Opinion, 27) and again on this appeal, the Government's entire argument has been devoted to the contention that the tugboats were not demised to the United States, under the charter agreements.

But the Government has wholly failed to show how that contention, if accepted, would relieve it from its plain contractual agreement to pay hire continuously for the entire charter periods, without deductions.

The Government's argument may be paraphrased as follows:

> "We admit the exchange of letters in which we agreed to pay hire, at a specified *per diem* rate, for each and every day of the respective charter periods, without any specified deductions whatsoever.
>
> "If those agreements demised the tugboats to us, we will pay the hire in full as agreed; but if the tugboats were not demised to us, then the plain language of our contractual agreements (which did not authorize any deductions), does not mean what it purports to mean, and we intend to make deductions in such amounts as *we* may determine."

The Government is apparently unable to cite a single authority in support of this astonishing proposition.

4. *The Court of Claims' Decision.*

As we have already stated, the lower court refused to accept the Government's evidence, and found the facts

to be contrary to the Government's contention; and, *on the facts* which it found, it ruled that the tugs had been demised to the Government.

The lower court summarized the Government's defense as follows:

> "The United States defends this suit upon the ground that the owner did not part with the possession, command and navigation of the tugs during the period of the charter, but that it retained possession and command, and performed the specific service for which the tugs were let. It is claimed that the charter was for service and not a demise, and consequently that the Government had the right to make the deductions for the time the tugs were not at its disposal" (27).

In the Fifth Finding of Fact, (26,) the court had already found as follows:

> "During the time when the tugs hereinbefore mentioned were in the service of the Government, the Army Transport Service had the *entire use* of the tugs and they were *subject at all times* to the orders and directions of the officers of the Government, and at no time during the period did the plaintiff have the use of, and did not in any way interfere with or direct the operation of the said tugs." (Italics ours.)

The lower court, in its opinion, at page 28, elaborated on that finding of fact as follows:

> "The Court finds as a fact that these tugs were subject at all times to the orders and directions of

the officers of the Government, and that the plaintiff did not interfere with or direct the operation of the tugs. The very nature of the service to be rendered was such as to require these tugs to be absolutely under the control and subject to the orders of the officers of the Army Transport Service. *The action of the parties in the execution of the contract* showed that the plaintiff surrendered the possession, command and control of the tugs to the officers of the Government; that this surrender was required and expected; and that the officers of the Army Transport Service took charge of the tugs, navigated them, controlled them, and had absolute possession of them." (Italics ours.)

These findings of fact were squarely and plainly against the Government's case.

On those findings of fact the trial court ruled that the tugs had been demised to the Government under the charters.

The appellee submits that such a conclusion of law necessarily and properly follows from the facts found by the trial court.

If this conclusion of law is sustained (as the appellee contends that it should be), then, *admittedly*, the Government's entire defense falls.

But even if it were to be held that the tugs were not demised to the Government, and that the charters were merely ordinary time charters, still, *in any event*, the

Government contracted to pay the hire continuously for the entire charter periods, and therefore cannot justify its deductions.

In other words, we wish to emphasize the point that, although the lower court disposed of the Government's defense by its conclusion that the tugs were, *on the facts,* demised to the Government, nevertheless a reversal of that ruling would not dispose of the real point in the case that the Government, by the plain language of its contracts, was obligated to pay the hire in full for the entire charter periods.

The terms of the charter agreements as to payment of hire, expressed in plain language, remain the same, and create the same obligation, whether there was any demise or not.

FIRST POINT.

THE JUDGMENT RESTS UPON FINDINGS OF FACT IN FAVOR OF CORNELL STEAMBOAT COMPANY AND AGAINST THE GOVERNMENT. THOSE FINDINGS OF FACT CANNOT NOW BE QUESTIONED BY THE GOVERNMENT.

The Court of Claims rested its decision squarely on certain definite findings as to the conditions and circumstances under which the tugs were operated during the periods of the respective charters, and upon all the evidence offered before it (which is not now before this

court), found the actual facts to be the opposite of those for which the Government was contending. This appears clearly not only from the Fifth Finding of Fact (26), but also from the following portions of the opinion of the Court.

> "The United States defends this suit upon the ground that *the owner did not part with the possession, command and navigation of the tugs* during the period of the charter, but that it retained possession and command and performed the specific service for which the tugs were let." (Italics ours. *Opinion,* 27.)

> "The Court finds as a fact that these tugs were subject at all times to the orders and directions of the officers of the Government, and that the plaintiff did not interfere with or direct the operations of the tugs. *The very nature of the service to be rendered was such as to require these tugs to be absolutely under the control and subject to the orders* of the officers of the Army Transport Service. *The action of the parties in the execution of the contract showed that the plaintiff surrendered the possession, command, and control of the tugs* to the officers of the Government; that this surrender was required and expected; and that the officers of the Army Transport Service *took charge of the tugs, navigated them, controlled them, and had absolute possession of them.*" (Italics ours. *Opinion,* 28-29).

No exception to those findings was filed by the Government.

In the recent case of *Keokuk & Hamilton Bridge Co.* vs. *United States* (1922), 260 U. S. 125, this Court said at page 126:

> "An appreciable part of the claimant's argument consists in an attempt to reopen the findings of fact and to maintain that the pier was destroyed, as giving more force to the contention that it was taken. This, of course, is vain. The Union Pacific Ry. Co. *v.* United States, 116 U. S. 154; Talbert *v.* United States, 155 U. S. 45".

In Talbert *v.* United States, (1894) 155 U. S. 45, this Court said at page 46:

> "On this appeal only questions of law can be reviewed, and none such are presented for our consideration."

In *United States* v. *Anciens Etablissements,* (1911) 224 U. S. 309, this Court said at page 329:

> "We can only act upon the record, and that shows a finding of the court upon the question of compensation, to which finding there was not objection taken nor exception reserved. The finding determines the matter, being in the nature of a special verdict of a jury. United States *v.* New York Indians, 173 U. S. 464."

In the case at bar, the opinion of the Court of Claims makes it quite clear that its findings of fact were the contrary of those asked for by the Government. It is also made particularly plain that the Court of Claims was in-

fluenced in its finding *by its review of all the testimony offered before.*

That testimony is not now before this Court, for it has not been included in the record filed by the appellant. It is, therefore, difficult to perceive how this Court can be asked to pass at all upon the correctness of the interpretation which the lower court gave to the whole evidence in the case.

The respondent therefore submits that this is peculiarly a case in which the rule referred to above should be adhered to rigorously.

On this ground, aside from any other, the appeal herein should be dismissed.

SECOND POINT.

IN VIEW OF ITS FINDINGS OF FACT, THE COURT OF CLAIMS PROPERLY RULED THAT THE CHARTERS DEMISED THE TUGS TO THE GOVERNMENT.

1. *While the appellee believes that the ruling of the lower court should be affirmed, a reversal on this question of demise would not defeat a recovery.*

The appellant's entire argument is devoted to an attempt to reverse the decision of the Court of Claims that the charters demised the tugs to the Government. The appellant's insistence on this alleged error might make it appear that the claim is considered to stand or fall

upon the determination whether the tugs were demised or were not demised.

Any such impression would be incorrect.

If the tugs were demised, then, *admittedly,* the Government cannot defend its deductions.

The appellee believes that the Court of Claims correctly ruled that the tugs were demised; *but,* in arguing for an affirmance on this point, the appellee emphasizes the further point that even if the charters were merely time charters, and did not demise the tugs, the owner would still be entitled to its recovery under the plain language of the contracts.

2. *The surrounding circumstances, as shown by all the facts, in each case, determine whether or not a charter is a demise.*

This Court said in *United States* vs. *Shea,* (1893), 152 U. S. 178, at page 189:

> "No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control."

In *Leary* v. *United States* (1871), 14 Wall. 607, this Court said, at page 610:

> "The question as to the character in which the charterer is to be treated is in all cases one of construction.

In other words, the decision in each case must depend upon all the facts and surrounding circumstances of the charters.

3. *The Findings of the Court of Claims in this case.*

The Second Finding of Fact (15-25) set forth the letters which covered the charter agreements.

The Fifth Finding of Fact (26) is as follows:

> "During the time when the tugs hereinbefore mentioned were in the service of the Government, the Army Transport Service *had the entire use* of the tugs, and they were subject *at all times* to the orders and directions of the officers of the Government, and at no time during the period did the plaintiff have the use of, and did not in any way interfere with or direct the operations of the said tugs."

The lower court, in its opinion, amplified these findings, and expressly stated that its findings were based upon all the facts and surrounding circumstances as shown by the evidence. It said, at pages 28 and 29:

> "The Court finds as a fact that these tugs were subject at all times to the orders and directions of the officers of the Government, and that the plaintiff did not interfere with or direct the operations of the tug. The very nature of the service to be rendered was such as to require these tugs to be absolutely under the control and subject to the orders of the officers of the Army Trans-

port Service. The action of the parties in the execution of the contract showed that the plaintiff surrendered the possession, command, and control of the tugs to the officers of the Government; that this surrender was required and expected; and that the officers of the Army Transport Service took charge of the tugs, navigated them, controlled them, and had absolute possession of them" (28-29).

4. *These findings support the ruling that the charters demised the tugs to the Government.*

In *The Charlotte* (W. D. N. Y., 1922), 285 Fed. 84, a case on all fours with the case at bar, this question was considered in connection with the charter of a tug, and the ruling of the District Judge was affirmed by the Circuit Court of Appeals, 299 Fed. 595. The more pertinent portions of the opinion of the District Judge are found in 285 Fed. 87:

> "In the present instance the charter states that the 'owner does hereby charter and lease', and though that description is not absolutely controlling, yet it must be given weight in the ascertainment of the intention of the parties. American Steel Barge Co. *v.* Cargo of Coal (D. C.), 107 Fed. 964. *The fact that the owners were to keep the tug in good condition and repair her when necessary, clean the boilers once in three weeks, and furnish the master and crew and pay them, does not negative the plain import of the charter* that from May 15, 1919 to some time between November 15

and December 15th, when navigation closed, *the tug would be in the possession, management, and control of the charterer. There are no reservations as to the operation of the tug.* That her captain was under the directions and control of the superintendent of public works, even though appointed by the owners, is clearly shown, not only by the charter party but by the proofs.

"It is not to be assumed that the charter was for affreightment, or merely for towage service, or for trips. In *The Bombay,* (D. C.) 38 Fed. 512, the charter party embodied a somewhat similar provision to those contained in the charter in question and the court held that the charterers had control, management and possession of the vessel. In *The India,* (C. C.) 16 Fed. 262, Judge Wallace decided that, where the charterer obtains custody and control of the ship, an ownership *pro hac vice* is created, even though the general owner appoints the master and selects the mariners." (Italics ours.)

The Circuit Court of Appeals, in affirming the District Court, said at 299 Fed. 596:

"Nothing need be added to the opinion of the court below in respect of its holding that the charter and lease of the *Charlotte* existing at the time of the alleged negligence was a demise of the vessel and made the State of New York her owner *pro hac vice.*"

In the case of *Hahlo* v. *Benedict,* (C. C. A. 2nd C. 1914) 216 Fed. 303, under the terms of a time charter of a yacht, although the owner appointed the captain, the

latter was obliged to submit to the orders and instructions of the charterer as though the charterer were in fact the owner,—just as here, the tugs of Cornell Steamboat Company during the periods of their respective charters, were, as found by the Court of Claims, absolutely and wholly subject to the orders of the officers of the Army Transport Service, and obliged to carry out those orders just as though they had come from the owner. In the *Hahlo* case, the Court said, at page 305:

> "The ninth article certainly intends to substitute the charterer for the owner, during the term of the charter; that is to say, it subjects the captain to the same direction from the charterer as he would be bound to give the owner were it not for the charter. In the face of this provision *it becomes of small consequence who originally engaged the captain,* provided the stranding resulted from his fault. * * * Mr. Justice Story, in Marcardier *v.* Insurance Co. 8 Cranch, 39, 49, 3 L. Ed. 481, puts the test in these words, 'exclusive possession, command and navigation.' The same thing is repeated in Reed *v.* United States, 11 Wall. 591, 600, 20 L. Ed. 220. In Leary *v.* United States, 14 Wall. 607, 610, 20 L. Ed. 756, the phrase is, 'entire command and possession of the vessel and the consequent control over her navigation.' This test seems to be approved in United States *v.* Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403." (Italics ours.)

In the *Del Norte* (C. C. A., 9th C., 1902), 119 Fed. 118, affirming 111 Fed. 542, the Circuit Court of Appeals said at page 122:

> "It is thus seen that by the contract of the parties the entire ship was let to the charterer, and the ship delivered to him, under the express and distinct agreement that he should have full charge of her; that all of the officers of the vessel including those that it was stipulated should be appointed by the owner, should be 'in all respects under the order and direction' of the charterer; and that all of the earnings of the vessel during the term, of whatever character, should belong to the charterer and inure to his sole benefit. These facts leave no room for doubt that not only the possession, but the entire control, of the ship and of all its officers passed by the agreement of the parties from the owner to the charterer.

In the same case, the District Judge, in 111 Fed. 545, said:

> "And the charterer is owner *pro hac vice* where the master is *subject to his orders and directions*, though appointed to his position as master by the general owner. *The India* (D. C.), 14 Fed. 476; *The Bombay* (D. C.), 38 Fed. 512. In such a case the charterer himself is responsible for the torts of the master, because, having a legal right to control, he is legally presumed to actually control the master's conduct. On the other hand, the gen-

> eral owner is not responsible, because he does not have the right to control the master in the performance of his duties." (Italics ours.)

The foregoing statement of the rule was quoted and followed in *Hills* v. *Leeds* (D. C. Me., 1907), 149 Fed. 878, 880; affirmed 158 Fed. 1020.

In *Leary* v. *United States*, (1871) 14 Wall. 607, this Court said at page 610:

> "Whether in any particular case such result follows must depend upon the terms of the charter party, considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter party let the entire vessel to the charterer with a transfer to him of its command and possession, and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated."

In the case of the *United States* v. *Shea*, (1893) 152 U. S. 178, certain boats were let to the United States under contract for indefinite periods of time, the owner furnishing certain members of the crew. This Court said at pages 189-191:

"No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command and control. Now by this contract it was stipulated that the petitioner should 'provide and furnish to' the government, whenever called upon, during a specified year 'such vessels of the descriptions hereinafter given as may be required to take the place of the vessels now performing service, etc.' and that in case of his failure so to do the government should have 'the power to hire vessels elsewhere in open market' at his 'sole expense and charge.' These are the operative words. *The contract is for vessels, and not for any use of them.* * * * There is no stipulation which in terms, or by implication, casts upon the petitioner the management or control of any vessel accepted by the government. That the time for which the vessels were to be employed might be limited by the wishes of the government does not affect the question as to whether, while so employed, they were to be under its exclusive control and management. A demise may be for a day as well as for a year, and may be terminable at the will of the lessor" (pages 189-190).

"We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control." (Italics ours; page 190.)

THIRD POINT.

WHETHER THE CHARTERS CONSTITUTED A DEMISE OR NOT, UNDER THE TERMS OF THE AGREEMENT HIRE WAS TO RUN CONTINUOUSLY OVER THE ENTIRE PERIOD OF EACH CHARTER, WITHOUT ANY DEDUCTIONS WHATSOEVER; AND THERE IS NOT ANY RULE OF LAW WHICH WOULD ENTITLE THE GOVERNMENT AS CHARTERER ARBITRARILY TO ALTER OR MODIFY THE EXPRESSED TERMS OF THE AGREEMENTS.

1. *The charters involved here belong to one of two classes of "time" charters.*

There are three classes of charter parties, in two of which the vessel is always let or hired for an agreed period of time. The three classes are:

(a). *A demise.* That form was discussed by this court in *The Barnstable,* (1900) 181 U. S. 464.

(b). *A time charter,* or ordinary hiring of the vessel, not constituting a demise. Such a charter was discussed in *Clyde Commercial S. S. Co.* v. *West India S. S. Co.* (C. C. A. 2nd C. 1909) 169 Fed. 275.

(c). *A voyage charter,* or contract of affreightment. This form was discussed in *Texas Co.* v. *Hogarth Shipping Co. Ltd.* (1920) 256 U. S. 619.

The (a) demise and (b) ordinary time charter are alike in that, *under both forms,* the vessel is let or hired

for an agreed period of time, and hire is to be paid, at a specified rate, from the beginning to the end of the charter period, unless there is some express exception providing for suspension of hire.

The principal difference between the two forms is that under a demise the ship's officers and crew become, *even in matters of navigation and care of the vessel,* the agents of the charterer, while under an ordinary time charter the officers and crew remain the agents of the owner with respect to the navigation and care of the ship.

The third class, referred to, is where a vessel is engaged to perform a specified trip, where the compensation is in the form of freight, payable in an agreed amount, irrespective of any question of time. That class of charter is obviously not involved in the case at bar.

The error in the appellant's argument lies in its failure to recognize the fact that even if the charters here did not constitute a demise (which the lower court held they did), they must still fall in the second class, as time charters; and, in either class, the contract is for the use of the vessels for an agreed period of time, with the corresponding promise to pay hire from the beginning to the end of the agreed period.

2. *The charters of the appellee's tugs were for varying periods of time.*

They were not agreements to perform certain specified work, or to steam so many hours per day, or to tow any designated vessels between any designated points.

On the contrary, they were agreements under which the owner let the tugs to the charterer *for agreed periods of time* (16-25).

The Court of Claims in the Second Finding of Fact specifically referred to the continuous period of time during which each tug was under charter to the Government (16-25). Those periods correspond with the summaries set forth in Schedules L1-L7, which were attached to the petition (13-14).

The Fifth Finding of Fact (26) expressly referred to conditions existing "*during the time* when the tugs hereinbefore mentioned were in the service of the Government."

The Court of Claims in its opinion again emphasized the fact that the tugs were let for agreed periods of time, by stating that "these tugs were hired by the Government *for different periods of time,* and the time of hire of each tug is set out in the findings of the court" (26).

It made no difference whether the period in any case were a day or a year, as the Court of Claims pointed out (28), quoting from the decision of this Court in the case of *United States* v. *Shea,* 152 U. S. 178, 190.

3. *The agreements expressly provided that hire should be paid at an agreed rate continuously during the entire charter period, without exception.*

A typical form of the language used in the exchange of letters between the parties is found in the letter writ-

ten by Cornell Steamboat Company to Captain Shelton on December 1st, 1917, covering the tugs *John T. Welch* and *Ellen M. Ronan* (17). A portion of the letter is as follows:

> "The price of the *John T. Welch* to be eighty ($80.00) dollars per twelve (12) hour day *for each and every day of the charter period.*"
>
> "The price of the *Ellen M. Ronan* to be One hundred and fifty ($150.00) Dollars per day (of twenty-four hours) *for each and every day of the charter period*" (Italics ours).

In addition to the fact that the language expressly provided for a continuous payment of hire during the entire period of each charter, *it is particularly significant that the agreements did not provide for any deductions or cessation of hire whatsoever.*

4. *Even under ordinary time charters, the law requires continuous payment of hire from beginning to end of the entire period, where the charters do not contain any exceptions.*

Hardly any rule of the maritime law has been more frequently, or more clearly stated. Any modification of that rule would revolutionize the business carried on under ordinary time charters.

In *Carver on Carriage of Goods by Sea* (6th Ed.), p. 741, the author, in discussing detentions or lost time

which may occur during the period of a time charter, says:

> "If they arise owing to defaults of the shipowner, there may be a counterclaim against him; but, in the absence of an agreement to the contrary, the time for which the freight is to be paid runs without a break from the beginning to the end of the agreed voyage or service." (Citing *Inman S. S. Co.* v. *Bischoff* (1882), 52 L. J. Q. B. 109, 6 Q. B. D. 648; 7 A. C. 6070.)

In *Scrutton on Charter Parties and Bills of Lading* (10th Ed.), 382, there is this general statement with respect to the payment of hire.

> "*In the absence of express agreement,* it is payable during the ship's detention by blockade, embargo, bad weather *or repairs,* unless the delay involved is so great as to put an end to the whole contract." (Italics ours.)

In the editors' note following the above quotation, it is explained that the continuing obligation to pay hire is frequently modified *by express provisions* in the charter party, in the form of what is commonly known as a "breakdown" clause; but the editors, at page 384, carefully revert to the general rule as follows:

> "*Except as specially provided by such a clause,* hire continues to be payable throughout the charter period. The charterer cannot rely on an excepted peril as excusing him from paying hire during the time in which, by such excepted peril, he

is unable to use the ship." (Italics ours.) (*Citing Brown* v. *Turner, etc.*, 1912 A. C. 12; *Aktieselskabet Line* v. *Turnburll*, 1907, Sess. Cas. 508; *Modern Co.* v. *Duneric S. S. Co.*, 1907, 1 K. B. 370).

In the case of *Atlantic Fruit Co.* v. *Solari* (D. C. S. D. N. Y., 1916) (238 Fed. 217, the court recognized the general rule in the following statement, at page 223:

> "It seems to be settled that the regular breakdown clause furnishes almost the only excuse for not paying hire, except the actual frustration of the enterprise."

The Court, in discussing the rule, summarized the leading cases as follows:

> "Judge Hough held in *The Santona* (C. C.) 152 Fed. 516, that a detention in quarantine for 36 hours caused no cessation of hire. The Circuit Court of Appeals of this Circuit decided in Clyde Commercial S. S. Co., Ltd. *v.* West India S. S. Co., 169 Fed. 275, 94 C. C. A. 551, Ward J., writing the opinion, that a detention of about 11 days by the Texas authorities did not relieve the charterer from the payment of hire. In Admiral Shipping Co. *v.* Weidener Hopkins & Co. (1916) L. R., 1 K. B. 429, there was a detention by the Russian government of a month, but Bailhache, J., held that this did not cause a cessation of hire. The same result was reached in the case of Scottish Navigation Co. *v.* W. A. Souter & Co. (1916) L. R. 1 K. B. 675. In F. A. Tamplin S. S. Co. *v.* Anglo-Mexican Petroleum Products Co. (1916), L. R. 1 K. B. 485, the Court of Divisional Appeal held

> that a British vessel on time charter, which was requisitioned by the government, must still pay hire, though the charterer had no use of her; and such was the decision in Modern Transportation Co. *vs.* Dunerie S. S. Co. (1916) L. R. 1 K. B. 726, though in that case the government only paid about half the charter hire agreed upon by the original parties."

In the case of *The Santona* (D. C., S. D., N. Y., 1907), 152 Fed. 516, Judge Hough, at pages 519-520, referred to the rule as follows:

> "It is specifically provided that the hire is to be paid after the vessel is 'placed at charterers' disposal', and to continue until her redelivery. Deductions of hire are specifically provided for in the usual breakdown clause and by the specific quarantine clause above quoted. It was held by a former judge of this Court, sitting as arbitrator in *The Steamship Hackney,* that, where it is specifically agreed by charter party that hire shall be suspended in certain instances, *it cannot be suspended by implication, for reasons not assigned in the contract, and in that ruling I entirely concur.* (Italics ours.)

The opinion of ex-Judge Choate in the case to which Judge Hough referred is printed in a footnote to the report of *The Santona,* 152 Fed., pages 520-524. Judge Choate said, at page 522:

> "The parties having in the charter party specified in what cases of disaster allowance shall be made of time lost to the charterer, the case must

be fairly brought within that specification, which cannot be enlarged by implication or on a theory that a case not so specified is within its reason."

In the English case of *Havelock* v. *Geddes,* 10 East. 555, 566, which was quoted by this Court with approval in its decision of the case of *United States* v. *Shea, supra,* Lord Ellenborough, refusing to allow any deductions under the charter, said:

> "From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs if they meant to make that reduction. Without such a stipulation, we think the true construction of the charter party is that whilst those repairs are going on the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments."

In the case of *Ripley* v. *Scaife,* 5 B. & C. 167, 169 Abbott, C. J. said:

> "There is in the charter party an express stipulation for the payment of freight from a certain day for six months certain, and so much longer as the vessel shall be employed by the plaintiffs. There not being any other stipulation for the case of repairs, I think that the ship was in the employ of the plaintiffs whilst those repairs were going on, and that they were liable to pay freight during that period."

Practically all of the cases referred to above involved only ordinary time charters,—i. e., no demise.

Yet, in each case, it will be seen that the court's decision turned upon the question *whether there was any express exception* in the contract, within which the cause of the lost time might fall; and in the absence of exception, hire was held to be payable continuously in spite of any delay for repairs, shortage of men, etc.

Therefore, there is not any rule of law which supports the Government's contention that if these contracts here were only time-charters, their language should not mean exactly what it says.

These contracts, even if they *did not* demise the tugs were plainly time charters, *i. e., hirings* of the vessels; and in view of their clear provisions and the general rule of law referred to, *it is impossible to see on what ground the deductions could be justified even if the ruling of the lower court on the question of demise should be modified.*

5. *The Government is unable to cite a single authority for its contention that it should not be held to the plain provisions of its contracts.*

Practically the entire brief submitted by the Government is devoted to a discussion of the question whether or not these charters constituted a demise of each tug. In the last paragraph of its argument, the Government says:

> "If the charter be declared a contract for service rather than a demise, it follows the deductions are proper, and the claim should be dismissed."

We confidently assert that no authority for that astonishing statement can be found.

The Government, following the above statement, refers to the decisions in *United States* v. *Shea,* 152 U. S. 178, and *Clyde Commercial SS. Co.* v. *West India SS. Co.* (C. C. A. 2nd C. 1909) 169 Fed. 275, 277.

Neither of those cases support the statement.

The case of the *United States* v. *Shea,* involved a demise, and therefore, is not in point.

The case of *Clyde Commercial SS. Co.* v. *West India SS. Co.* involved a time charter, and not a demise, and the whole question before the Court was whether or not certain delays or lost time fell within the specific exceptions of the charter party.

The rule expressly recognized by the Circuit Court of Appeals in the *Clyde Commercial S. S. Co.* case was that, unless the delays were due to causes specifically excepted by the charter party, the charterer, *even under a time-charter and even in the absence of a demise,* was obligated to pay hire continuously for the entire period.

FOURTH POINT.

THE RECOVERY WITH RESPECT TO THE STEAMTUG *Ira M. Hedges* WAS PROPERLY ALLOWED.

The Government in its brief repeatedly refers to the item of $8100, on account of the hire for the steamtug *Ira M. Hedges* while she was being raised from the bottom of the river and repaired. The insistent references of the Government to this item might raise the impression that it is something apart and different from the other items of the claim.

We respectfully submit that whether the charter of the *Ira M. Hedges* constituted a demise, as the Court of Claims held, or whether it was merely a time charter, the hire for the entire period is properly recoverable.

If the charter constituted a demise, then clearly the Government cannot seek to make any deduction during the period of repairs. The Government apparently does not dispute that proposition.

If the charter was merely a time charter, and not a demise, *nevertheless the hire would run continuously* in the absence of any exception or break-down clause in the charter party. We have discussed that proposition of law in the preceding point of this brief.

In the absence of a specific exception in the contract, the only excuse which the charterer could offer for the cessation of hire, *even under a time charter not consti-*

tuting a demise, would be a frustration of the adventure.

Cf. *The Frankmere* (E. D. Va., 1920), 262 Fed. 819; affirmed (C. C. A. 4th C., 1921), 278 Fed. 139; *The Claveresk* (C. C. A. 2nd C., 1920), 264 Fed. 276; *The Isle of Mull* (C. C. A. 4th C., 1921), 278 Fed. 131; Carver on Carriage of Goods by Sea (6th Ed.), p. 741.

It clearly appears from the Fourth Finding of Fact (25), that the sinking of the tug *Ira M. Hedges* did *not* amount to a frustration, for it is specifically stated as a fact that the tug was raised and "was subsequently used by the defendant".

Therefore, in the absence of a frustration, and in the absence of any exception or break-down clause in the charter party, the hire for the *Ira M. Hedges* ran continuously for the entire period of charter party, irrespective of whether or not the charter amounted to a demise.

This item, therefore, does not rest on any different proposition of law than the other items of the claim.

The record before the lower court contained a great deal of evidence as to the cause of the sinking of the *Ira M. Hedges,* and as to the conferences between the parties and their agreement with respect to the raising and repairing of the tug.

The Government, at the twelfth page of its brief, admits that the details of the evidence are not stated in the findings. *They were not stated because such state-*

ment was not necessary, in view of the decision that the charter amounted to a demise.

In the absence of any detailed statements in the findings of fact, and in the absence of the testimony which the lower court had before it, we again submit that this is peculiarly a case in which the findings and conclusions of the lower court should not be disturbed.

FIFTH POINT.

THE GOVERNMENT CANNOT NOW SUPPORT ITS POSITION BY A BELATED SUGGESTION THAT IT IS ENTITLED TO AN OFF-SET ON ACCOUNT OF ALLEGED NEGLIGENCE OF THE OWNER OF THE TUGS.

At page 22 of its brief, the Government says:

> "If the owner failed to perform his undertaking to provide a full crew or to maintain and supply the vessels so as to enable them to perform the service, it would be responsible in damages for such breach measured in this case by the charter hire for such period."

That statement necessarily raises a question whether any of the delays complained of were caused or contributed to by fault or negligence of the owner of the tugs, in breach of its contracts.

There is not any finding of fact in the record before this court of any such negligence or fault on the part of Cornell Steamboat Company, as owner of the tugs.

The question was not raised or tried or decided in the lower court, and is not now before this court.

Certainly this Court, without any finding of the lower court on the point, and without any of the evidence before it, can hardly be expected to determine whether the alleged delays to the tugs arose through any negligence on the part of Cornell Steamboat Company.

Repairs might obviously be necessitated by causes entirely apart from negligence.

Any alleged shortage of crews would not raise any presumption of negligence on the part of the owner. *The Ice King* (C. C. A. 2nd C. 1919), 261 Fed. 897.

As to the alleged delays of the tugs when taking on supplies, there is not anything in the record to indicate any negligence of the owner. On the contrary, the Third Finding of Fact, (25), expressly states that this alleged cause of delay was purely a matter *of arbitrary opinion* of the Army officer in charge.

The belated claim of alleged negligence on the part of the owner is something entirely apart from the owner's right to collect hire in full, and is a claim which has never been litigated or mentioned in this case, prior to the statement now appearing in the Government's brief.

We respectfully submit that that statement has no place in the case on appeal, and should be disregarded.

SIXTH POINT.

THE GOVERNMENT SHOULD NOT BE PERMITTED TO SUGGEST IN ITS BRIEF A STATEMENT OF FACTS NOT SUPPORTED BY THE FINDINGS OF THE COURT OF CLAIMS.

Practically one-quarter of the Government's brief is devoted to quotations from the dissenting opinion of Judge Booth. (Government's Brief, pp. 15-21.)

The Government's brief also contains various statements of fact which cannot be supported by any reference to the record before the court, except to remarks contained in the dissenting opinion.

We protest against this practice.

It is not our understanding that the remarks of the dissenting judge constitute any part of the findings of the lower court. His remarks indicate an interpretation of the evidence which is in many instances the opposite of the facts actually found by the majority of the court.

Certainly this Court, without having before it any of the evidence, is not in a position to determine whether the interpretation given to the evidence by the dissenting judge should be accepted in preference to the findings of the majority of the court.

Thus, at page 2 of the Government's brief, we find the statement that the officers and crews of the tugs "were subject to dismissal and discipline only by" the owner. The only support for this positive statement is

a remark in Judge Booth's dissenting opinion, and, if the entire evidence in the case were now before this court, it would at once appear that that interpretation of the evidence is open to very serious question.

Again, at page 3 of its brief, the Government states that it "at the time, regarded the tugs hired upon a service basis, with the owner remaining responsible for the operation, control, and navigation of the tugs, through the officers and crews, their servants." We consider that statement wholly unjustifiable in the face of the findings of the Court of Claims; and because the statement is included in the Government's brief without justification, we cannot avoid the remark in passing that that statement is flatly contradicted by the evidence in the lower court of Captain Shelton, who entered into the agreements on behalf of the Government.

Again at page 11 of its brief, the Government, referring to its deductions, says:

> "Notice thereof was given the owner. This practice clearly denies that the Government considered the agreement a demise of the vessel. To the contrary it insisted that the owner properly man and equip its tugs, as provided, and it denied the right to discipline the crews for lax attention in the handling of the tugs; * * *."

This statement is not only misleading, but it is certainly not supported by the findings of the Court of Claims.

If the Government is to be permitted to put forward interpretations of fact based on the dissenting opinion, the appellee should be allowed to point that, on the evidence presented before the lower court, there was a very serious dispute as to whether the Government had even proved the correctness of the deductions which it sought to make.

The testimony on that point was not summarized in detail by the Court of Claims, and no definite findings of fact as to it were filed, presumably because further discussion of the point was unnecessary, under the ruling that the tugs were demised to the Government.

The only evidence offered by the Government, to prove the alleged lost time, consisted of certain files of daily logs or work sheets of the respective tugs, which were kept by the tug captains solely for, and at the instructions of the Army Transport Service, without any participation or knowledge of the owner of the tugs.

Those logs, therefore, so far as the Government was concerned, constituted self-serving declarations and could not be offered in evidence as proof of the Government's claim, particularly where not proved by the men who wrote them.

The courts have repeatedly held that a ship's log book cannot be offered in evidence by those persons in whose interests it was written. *Worral* v. *Davis Coal & Coke Co.* (S. D. N. Y. 1902) 113 Fed. 549; *The Kentucky* (S. D. N. Y. 1906) 148 Fed. 500; *Cobb* v. *Mackee* (1851) 1 How. 51.

The rule is also referred to in *Wigmore on Evidence,* Vol. 3 Section 1641; and *Greenleaf on Evidence,* 15 Ed. Sec. 495. In the case of *United States* v. *Gilbert,* 1834, Fed. Cas. No. 15304, Justice Story said:

> "I have yet to learn that parties can thus create evidence for themselves by inserting facts in a log book."

In the English case of *Sociedad Feliz,* 1 W. Rob, 303, Dr. Lushington said:

> "The log book of the party suing can never be made evidence in his favor under any circumstances."

As a matter of fact, many of the logs in the files offered in evidence in the lower court by the Government were on their face incorrect, for in numerous instances the entries actually showed that the tugs had been working during periods for which deductions had been claimed.

In still more numerous instances there were not any daily logs or work sheets at all on days for which the Government was claiming deductions, and there was not any explanation as to their absence, for the tug captains were supposed to file a daily report whether their tugs worked or not.

It would be exceedingly unjust to the respondent if such questions of fact were reopened on this appeal, when this Court has not all the evidence before it.

LAST POINT.

THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE AFFIRMED, AND THIS APPEAL SHOULD BE DISMISSED.

Respectfully submitted,

ROBERT S. ERSKINE,
JOHN M. WOOLSEY,
Counsel for Appellee.

New York City, January, 1925.

UNITED STATES *v.* CORNELL STEAMBOAT COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 265. Argued January 28, 29, 1925.—Decided March 2, 1925.

Tug-boats were chartered to the United States for a per diem for each and every day of the charter period, the owner agreeing to furnish everything for them, except coal and water, which were to be furnished by the United States; the Government had the entire use of the boats and they were subject at all times to the orders

and directions of its officers. *Held*, a demise; and that the United States was not entitled to make deductions from the owner's monthly bills for loss of service caused by short crews, ill condition, delay in taking on supplies, and by the sinking of one of the boats, which was raised and repaired by the owner. P. 286.

58 Ct. Clms. 497, affirmed.

APPEAL from a judgment of the Court of Claims allowing the claimant, appellee, recovery of deductions made by the United States from the bills rendered by the claimant under a charter of tug-boats.

Mr. J. Frank Staley, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the briefs, for the United States.

The rule announced in this Court in *New Orleans-Belize S. S. Co.* v. *United States*, 239 U. S. 202, determines that the charters of the tugs in this case were contracts for hire and did not constitute a demise. See also *The Spokane*, 294 Fed. 242; *Bramble* v. *Culmer*, 78 Fed. 497; *Clyde Commercial S. S. Co.* v. *West India S. S. Co.*, 169 Fed. 275.

The charters gave the use of tugs, some for a day of 12 hours, others for a day of 24 hours, at a daily rate. The letting for a 12-hour day is inconsistent with a demise of the boat.

The owner, by express terms, agreed to supply everything in connection with the maintenance and operation of the tugs, with the exception of coal and water, which the Government was to furnish. The owner undertook to provide and pay the crew. The charterer was without authority to nominate or select the officers and crew or to discharge or discipline them. The owner provided subsistence for the crew, ship's stores, including oil for engines and machinery, assumed all responsibility for keeping the tugs equipped and in proper running order and condition without limitations of any kind.

The practice of submitting accounts monthly, clearly denies that the Government considered the agreement a demise of the vessel. To the contrary it insisted that the owner properly man and equip its tugs as provided and it denied the right to discipline the crews for lax attention in the handling of the tugs; rather it imposed upon the tugboat owner penalties for its failing to provide full crews and to discipline the officers and crew, which it regarded owner's duty.

Again when the *Ira Hedges* sank, the owner at its own expense raised the vessel and repaired it. This it was bound to do by the terms of the charter. If the charter is to be read as a demise of the tugs, such loss would have been borne by the Government as *pro hac vice* owner, and not by the owner.

It is common knowledge that tugs employed in harbor service keep a log of the movements of the tug and the services they perform covering every day, whether the tugs are in the service of the owners or if they are hired to others. The fact that such logs were kept under the direction of the Army Transport Service can not be considered a factor determining the arrangements a demise.

Courts are not inclined to regard the contract as a demise of the ship if the end in view can be accomplished without the transfer of the vessel to the charterer. *Reed* v. *United States*, 11 Wall. 591. See *Leary* v. *United States*, 14 Wall. 607; *Donald* v. *United States*, 39 Ct. Clms. 357; *Plant Investment Co.* v. *United States*, 45 Ct. Clms. 374. *United States* v. *Shea*, 152 U. S. 178, distinguished.

Mr. Robert S. Erskine, with whom *Mr. John M. Woolsey* was on the brief, for appellee.

The judgment rests upon findings of fact. These cannot now be questioned by the Government.

The surrounding circumstances, as shown by all the facts, in each case, determine whether or not a charter is a demise. *United States* v. *Shea*, 152 U. S. 178; *Leary* v. *United States*, 14 Wall. 607.

The findings here support the ruling that the charters demised the tugs to the Government. *The Charlotte*, 285 Fed. 84; s. c. 299 Fed. 596; *Hahlo* v. *Benedict*, 216 Fed. 303; *The Del Norte*, 119 Fed. 118.

There are three classes of charter parties, in two of which the vessel is always let or hired for an agreed period of time. (a) a demise; *The Barnstable*, 181 U. S. 464; (b) a time charter, or ordinary hiring of the vessel, not constituting a demise; *S. S. Co.* v. *West India S. S. Co.* 169 Fed. 275; (c) voyage charter, or contract of affreightment; *Texas Co.* v. *Hogarth Shipping Co.* 256 U. S. 619.

The demise and ordinary time charter are alike in that, under both forms, the vessel is let or hired for an agreed period of time, and hire is to be paid, at a specified rate, from the beginning to the end of the charter period, unless there is some express exception providing for suspension of hire.

The principal difference between the two forms is that under a demise the ship's officers and crew become, even in matters of navigation and care of the vessel, the agents of the charterer, while under an ordinary time charter the officers and crew remain the agents of the owner with respect to the navigation and care of the ship.

The third class referred to is obviously not involved in the case at bar.

The error in the appellant's argument lies in its failure to recognize the fact that even if the charters here did not constitute a demise (which the lower court held they did), they must still fall in the second class, as time charters; and, in either class, the contract is for the use of the vessels

for an agreed period of time, with the corresponding promise to pay hire from the beginning to the end of the agreed period.

Even under ordinary time charters, the law requires continuous payment of hire from beginning to end of the entire period, where the charters do not contain any exceptions. *Carver on Carriage of Goods by Sea* (6th Ed.), p. 741; *Scrutton on Charter Parties and Bills of Lading* (10th Ed.), 382; *Atlantic Fruit Co.* v. *Solari*, 238 Fed. 217; *The Santona*, 152 Fed. 516; *Havelock* v. *Geddes*, 10 East. 555; *Ripley* v. *Scaife*, 5 B. & C. 167.

In the absence of a specific exception in the contract, the only excuse which the charterer could offer for the cessation of hire, even under a time charter not constituting a demise, would be a frustration of the adventure. *The Frankmere*, 262 Fed. 819, 278 Fed. 139; *The Claveresk*, 264 Fed. 276; *The Isle of Mull*, 278 Fed. 131.

The Government cannot now support its position by a belated suggestion that it is entitled to an off-set on account of alleged negligence of the owner of the tugs

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This proceeding was instituted to recover the sum of deductions made by the United States from monthly bills rendered by appellee for the hire of tugs.

During 1917 and 1918, under informal charters evidenced by letters, appellee hired twelve tugs to the United States for use in and about New York Harbor. The specified price was "for each and every day of the charter period," and the owner agreed "to furnish everything for these tugs with the exception of coal and water which you are to furnish."

The vessels reported for service in accordance with the several contracts and the plaintiff rendered monthly bills

at the per diem rate stated therein. Those for December, 1917, were paid as rendered. Thereafter deductions were made which amounted in all to $24,822.48. They were based upon the vessels' logs, kept by their captains and engineers as directed by the Army Transport Service, and were entered if a boat reported with a short crew, or not in condition to perform the service required, or if too long a time was consumed in taking on supplies. The owner saved its rights through proper claims and protests.

While in the service of the United States the "Ira M. Hedges" sank. It was raised and repaired by and at the expense of the owner, and was subsequently used by them. One of the challenged deductions was for loss of time incident to this accident.

"During the time when the tugs hereinbefore mentioned were in the service of the Government, the Army Transport Service had the entire use of the tugs and they were subject at all times to the orders and directions of the officers of the Government, and at no time during the period did the plaintiff have the use of and [it] did not in any way interfere with or direct the operations of the said tugs."

The United States maintain that the owner did not part with possession, command and navigation during the charter periods; that the charter was for service, and not a demise; and that consequently they rightly made deductions for the time the vessels were not at their disposal.

Relying upon the doctrine approved in *United States v. Shea*, 152 U. S. 178, the Court of Claims concluded that the charter amounted to a demise and that the deductions were not permissible. It accordingly sustained the claim of the owner, appellee here. Accepting the facts as found, we agree with that conclusion and affirm the judgment.

Affirmed.